Supreme Court, U.S.
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No. _____

In the

# SUPREME COURT OF THE UNITED STATES

SAMUEL G. KOORITZKY,

*Petitioner,*

*-v-*

ALEXIS M. HERMAN, SECRETARY
UNITED STATES DEPARTMENT OF LABOR

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. WHETHER A *PRO SE* ATTORNEY LITIGANT AND SUCH ATTORNEY'S INDEPENDENT OUTSIDE LEGAL COUNSEL AND INDEPENDENT EXPERT PARALEGAL ARE ENTITLED TO RECOVER ATTORNEY'S FEES AND LEGAL ASSISTANT/PARALEGAL EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT WHEN THE *PRO SE* ATTORNEY LITIGANT AND HIS LEGAL TEAM PREVAIL ON THE MERITS OF THE UNDERLYING ACTION?

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## OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (the "District Court") on the merits below is published at *Kooritzky v. Martin*, 1992 U.S. Dist. LEXIS 9401 (D.D.C. July 1, 1992). The United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") reversed the District Court's decision on the merits below in an opinion published as *Koortizky v. Reich*, 17 F.3d 1509 (D.C.Cir. 1994). Upon further review, the District Court issued its final judgments on the attorneys' fees portion of this matter as *Kooritzky v. Herman*, 6 F. Supp. 2d 1 (D.D.C. 1997), *rev'd* 178 F.3d 1315, 1999 U.S. App. LEXIS 13638 (D.C. Cir. 1999) ("*Kooritzky v. Herman I*"), and *Kooritzky v. Herman*, 6 F. Supp. 2d 13 (D.D.C. 1998), *rev'd* 178 F.3d 1315, 1999 U.S. App. LEXIS 13638 (D.C. Cir. 1999) ("*Kooritzky v. Herman II*"). The Court of Appeals reversed the District Court's fee decisions in *Kooritzky v. Herman*, 178 F.3d 1315, 1999 U.S. App. LEXIS 13638 (D.C. Cir. 1999).

## JURISDICTION

The judgment of the panel of the United States Court of Appeals for the District of Columbia Circuit was entered on June 18, 1999. The Order of the District of Columbia Circuit denying Samuel Kooritzky's petition for rehearing *en banc* was entered on August 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

***5 U.S.C. § 552(a)(4)(E). (Freedom of Information Act) Public information; agency rules, opinions, orders, records, and proceedings.***

. . .

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

. . .

***5 U.S.C. § 553(b). (Administrative Procedures Act) Rule Making.***

. . .

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. . .

. . .

***5 U.S.C. § 553(c). (Administrative Procedures Act) Rule Making.***

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

***28 U.S.C. § 2412(d)(1)(A). (Equal Access to Justice Act) Costs and Fees.***

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

***28 U.S.C. § 2412(d)(2)(A). (Equal Access to Justice Act) Costs and Fees.***

"[F]ees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)

***42 U.S.C. § 1988(b). Proceedings in Vindication of Civil Rights - Attorney's Fees.***

In any action or proceeding to enforce a provision of sections 1981, 1981(a), 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000(bb) et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000(d) et seq.), or section 13981 of this title, [1] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

***42 U.S.C. § 1988(c). Proceedings in Vindication of Civil Rights - Expert Fees.***

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981(a) of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

## STATEMENT OF THE CASE

In approximately July 1991, government officials from the United States Immigration and Naturalization Service (the "INS") and the United States Department of Labor (the "DOL") conspired to eliminate immigrant worker substitution[1] for approved labor certifications and deprive the American public of its right to be heard on this substantive change to regulations governing employment-based immigration. This conspiracy culminated in the DOL's defective promulgation of regulations in absolute contravention of the notice and comment provisions of the Administrative Procedures Act, 5 U.S.C. § 553(b) and (c) (the "APA").

In response to the unlawful activities by the DOL, in November 1991 the Petitioner, Samuel G. Kooritzky (hereafter "Kooritzky"), and his attorneys undertook the daunting task of overturning the DOL's new, illegally promulgated "substitution

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[1] As clearly described by District Court Judge Oberdorfer below, the "substitution rule" is a practice "whereby an 'employment-based' immigrant applicant could be certified for admission as a substitute for another." *Kooritzky v. Herman*, 6 F. Supp.2d 1, 2 (D.D.C. 1997) (citing *Kooritzky v. Martin*, U.S. Dist. LEXIS 9401 (D.D.C. July 1, 1992)).

rule." It is undisputed that Kooritzky did try to find an attorney to represent him in the action against the DOL. *See, Kooritzky v. Herman*, 6 F. Supp. 2d 1, 3 (D.D.C. 1997), *rev'd* 178 F.3d 1315, 1999 U.S. App. LEXIS 13638 (D.C. Cir. 1999) ("*Kooritzky v. Herman I*"). Nevertheless, the DOL is a formidable opponent and the DOL's improper regulatory action caused financial hardship to Kooritzky's specialized legal practice (a practice which chiefly was focused on employment-based immigration utilizing the "substitution" procedure). As a result, Kooritzky was unsuccessful in his attempts to secure outside representation and was forced to bring the underlying action on the merits *pro se* in the United States District Court for the District of Columbia (the "District Court") with independent attorneys who, in the words of District Judge Oberdorfer, "provided able assistance to [Kooritzky]." *Kooritzky v. Herman I*, 6 F. Supp. 2d at 11.

In June, 1992, the District Court (Oberdorfer, J.) granted summary judgment in favor of the government. *See, Kooritzky v. Martin*, U.S. Dist. LEXIS 9401 (D.D.C. July 1, 1992).

Kooritzky appealed the District Court's decision to the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals"). Upon review, the Court of Appeals determined that "[t]he Department's interim final rule [did] not even come close to complying with the notice requirement of [the APA]," *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994), and held that "the Department of Labor promulgated its 1991 amendment . . . in violation of [the Administrative Procedure Act]." *Id.* at 1514.

Kooritzky and his attorneys ultimately prevailed on the merits in the Court of Appeals and were granted the sole relief originally sought below (i.e., to have the DOL's illegal and

under-handed promulgation of a new "anti-substitution" rule overturned). The Court of Appeals, in an opinion highly critical of the DOL's actions, disdainfully found that the DOL had, in fact, used the elimination of "its substitution rule as a bargaining chip" for a back room deal on labor certification priority dates with the INS. *Kooritzky v. Reich*, 17 F.3d at 1513-1514.

Indeed, Kooritzky's unhappy experience with DOL rule-making was not the agency's lone attempt to impose arbitrary regulatory whims irrespective of the APA. *See generally*, *National Association of Manufacturers v. Department of Labor*, 159 F.3d 597 (D.C. App. 1998), holding that non-profit Plaintiff suing DOL for improperly issuing certain immigration-related regulations (regarding H-1B status non-immigrant applicants) without appropriate notice and comment *was, in fact, entitled to recover attorneys' fees* under EAJA. It is this unequal treatment of litigants that must be resolved by this Court.

One fact which cannot be disputed is that Kooritzky obtained the single result for which he initiated the action against the DOL on the merits below (i.e., to overturn the DOL's promulgation of a new "substitution rule" in complete disregard to the requirements of the APA). Kooritzky's resounding victory was obtained through years of hard work, extensive legal consultation with his independent, outside attorneys, and a quality legal product Kooritzky, his attorneys, expert legal assistant, and support personnel researched and developed. A cursory review of the District Court record is demonstrative of the breadth of time and effort that went into Kooritzky's victory in this matter.

Accordingly, having prevailed on the merits, Kooritzky applied for fees and expenses under 28 U.S.C. § 2412(d) (the "EAJA"). Pursuant to District Court Judge Oberdorfer's December 17, 1997 and May 7, 1998 Orders, Kooritzky was awarded attorneys' fees and expenses for himself and his independent, outside attorneys, including one law student attorney/expert legal assistant, in the amount of One Hundred Thirty-Eight Thousand Eight Hundred Eighty-One Dollars and Seventy-Four Cents ($138,881.74) incurred from 1991 through 1997. *See generally, Kooritzky v. Herman*, 6 F. Supp. 2d 13 (D.D.C. 1998), *rev'd* 178 F.3d 1315, 1999 U.S. App. LEXIS 13638 (D.C. Cir. 1999) ("*Kooritzky v. Herman II*").

The District Court breakdown is as follows:

| | |
|---|---|
| Kooritzky: | $ 55,992.06 |
| Teras: | $ 40, 815.76 |
| Moore: | $ 25,441.50 |
| Purcell: | $ 14,481.79 |
| Kim: | $ 2,015.93 |
| TOTAL FEES: | $138,747.04 |
| TOTAL EXPENSES: | $ 134.70 |
| GRAND TOTAL: | $138,881.74 |

*Kooritzky v. Herman II*, 6 F. Supp. 2d at 23.

The District Court's attorney fees jurisdiction arose under the EAJA, 28 U.S.C. § 2412(d); its merits jurisdiction arose under the Administrative Procedures Act, 5 U.S.C. § 706 and 28 U.S.C. § 1331. The Court of Appeals' jurisdiction arose under 28 U.S.C. § 1291.

## REASONS FOR GRANTING THE WRIT

### I.

**The Equal Access to Justice Act clearly and unambiguously entitles a prevailing party *as a matter of right* (not mere court discretion) to recover fees and other expenses incurred in a civil action against the United States where the activities of the United States are not deemed substantially justified. EAJA does not preclude *pro se* attorney litigants from recovering fees.**

The Court of Appeals finding, as a matter of law, that "an attorney acting *pro se*, such as Kooritzky, is not entitled to recover attorney fees under the EAJA" definitely is erroneous. *See, Kooritzky v. Herman*, 178 F.3d 1315, 1316 (D.C. Cir. 1999) (*"Kooritzky Fee Appeal"*). Kooritzky argued to the District Court and to the Court of Appeals that the mandatory fee-shifting provisions of EAJA and the discretionary fee-shifting language of 24 U.S.C. § 1988 (the "Civil Rights Act") involved in *Kay v. Ehler*, 499 U.S. 432 (1991), are distinct and different. The District Court agreed, *see generally, Kooritzky v. Herman I*, but the Court of Appeals disagreed. *Kooritzky Fee Appeal*, 178 F.3d at 1317. The District Court readily supported Kooritzky's claim that the EAJA "differs in both language and purpose from the attorneys' fee provisions of the Civil Rights Act and the Freedom of Information Act." *Kooritzky v. Herman I*, 6 F. Supp. 2d at 3. Conversely, the Court of Appeals held that "the fee shifting provision of EAJA does not differ in any material way from the statutes construed by the Supreme Court in [*Kay*]." *Id.*

In reaching this decision, the Court of Appeals has illuminated the confusion that exists regarding this Court's holding in *Kay*. The Court of Appeals' holding obviously

extends the reach of *Kay* beyond the Civil Rights Act to include the EAJA — even though this Court unanimously, specifically, and intentionally *did not include* the EAJA within the scope of its ruling in *Kay*. *See, Kay*, 499 U.S. at 435.

The Equal Access to Justice Act provides, in pertinent part, that

> [A] court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). "'[F]ees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, . . . or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees." 28 U.S.C. § 2412(d)(2)(A).

In the merits phase of this action Kooritzky filled the advocacy role of an attorney, for which he is entitled to a fee award measured by the EAJA. *Kooritzky v. Herman I*, 6 F. Supp. 2d at 3-4. As an alternative basis for fees, as the District Court ruled, he served as an expert in immigration law, for which he is entitled to an award measured by the EAJA. *Id.*

When Kooritzky first sought to correct the defective rule promulgated by the DOL, he diligently sought out counsel to represent him in the action. *Id.* When unsuccessful at finding counsel to lead the case, Kooritzky decided to pursue the matter

"*pro se*" with significant help, advice, and guidance from experienced, independent, outside counsel and an APA expert legal assistant. *Kooritzky v. Herman I*, 6 F. Supp. 2d at 3-4, 6; *see also, Kooritzky v. Herman II*, 6 F. Supp. 2d at 17-18. It was abundantly clear to District Court Judge Oberdorfer that Kooritzky did share a *bona fide* attorney/client relationship with the independent attorneys that assisted Kooritzky with his claim. *Kooritzky v. Herman I*, 6 F. Supp. 2d at 5. The District Court adopted the argument that "neither a written agreement nor the payment of fees is necessarily required to establish an attorney-client relationship." *Id.* (citing *Matter of Lieber*, 442 A.2d 153 (D.C. App. 1982)).

Even the District of Columbia Court of Appeals has held that an attorney's fees award under the EAJA is appropriate where the attorney/client relationship included an express agreement that the parties were *not* obligated to pay the attorneys. *American Ass'n of Retired Persons v. EEOC*, 873 F.2d 402, 406 (D.C. Cir. 1989). Ultimately, after a careful review of the facts and applicable law, the District Court found that Kooritzky's independent, outside legal counsel "assisted [Kooritzky] in his successful challenge to a government regulation; as such, they are entitled to compensation under the [EAJA]." *Kooritzky v. Herman I*, 6 F. Supp. 2d at 6.

The Court of Appeals, however, held that this Court's decision in *Kay* regarding *pro se* attorneys' fees in Civil Rights Act cases also was controlling in EAJA cases. Clearly this rule cannot be the case. In *Kay*, on behalf of this Court, Justice Stevens took great care to limit the applicability of the Court's decision to cases brought under the Civil Rights Act. *Kay*, 499 U.S. at 432, 436. *Kay* did not address anything other than Civil rights fee-shifting statutes. Today, however, courts are in disagreement as to the availability of attorneys' fees under fee shifting statutes like EAJA. *See generally, Doe v. Bd. of Educ.*,

165 F.3d 260, (4th Cir. 1998), *cert. denied*, 119 S.Ct. 2049 (1999); *SEC v. Waterhouse*, 41 F.3d 805, 808 (2d Cir. 1994).

At no point in the body of Justice Stevens' opinion for the Court in *Kay*, does he even suggest that the Court's decision applies to EAJA, or any other fee-shifting statute for that matter. *See generally, Kay*, 499 U.S. 432. Even in his evaluation of statutory purpose and Congressional intent, Justice Stevens clearly holds that "the overriding statutory concern is the interest in obtaining independent counsel for *victims of civil rights violations*." *Kay*, 499 U.S. at 437.

Clearly in the matter at hand Kooritzky was not a victim of a civil rights violation. Kooritzky's successful attack on the DOL was not personal. In fact, as an attack against a violation of the APA, Kooritzky's success benefits all Americans and those who hope to become Americans. Kooritzky was not a victim of gender or age discrimination. Kooritzky's argument was business — Kooritzky, and all Americans, are entitled to notice and comment from the DOL. They denied that right. Noting the impersonal nature of the underlying action, the Court of Appeals noted in *Kooritzky v. Reich* that DOL's actions were improper because "[i]nterested persons, including Kooritzky . . . had no opportunity to present their views on the matter before the Department acted." *Kooritzky v. Reich*, 17 F.3d at 1514.

Further distinguishing the instant matter from *Kay*, (as noted by Judge Oberdorfer below, *see Kooritzky v. Herman I*, 6 F. Supp. 2d at 3-4) is that Kooritzky *did* endeavor to retain counsel to enter an appearance and fully and formally handle his lawsuit for him. While the Court might prefer that every litigant hire independent counsel, Judge Oberdorfer wisely noted that "the fact that [Kooritzky] himself was the only attorney willing to challenge the Department [of Labor] makes him no less

entitled to compensation for the legal work required to do so." *Kooritzky v. Herman I*, 6 F. Supp. 2d at 4. Kooritzky *did attempt* to retain counsel. Kooritzky *wanted* counsel to take on the formidable DOL on his behalf. However, when it became apparent that he could not find an attorney to take his case he had no choice but to handle the matter *pro se*, while arranging on a contingent basis for independent attorneys and a legal assistant to counsel and support him.

The Court of Appeals' decision also is erroneous because, at a bare minimum, the fee-shifting statutes of the Civil Rights Act and the EAJA are not similar in form nor substance, nor are they interchangeable. For example, the Civil Rights Act allows a court discretion in awarding attorneys' fees. 42 U.S.C. § 1988(b). To the contrary, the EAJA mandates that a court *shall award fees* to the prevailing party if the United State's position was not substantially justified. 28 U.S.C. § 2412(d)(1)(A). Moreover, as noted by Justice Stevens in *Kay*, "the overriding statutory concern [under § 1988 cases] is the interest in obtaining independent counsel for *victims of civil rights violations*." *Kay*, 499 U.S. at 437. Certainly Kooritzky was not a the subject of a civil rights violation. His action was brought under EAJA where the principal concerns are (1) recovery for victims of abusive governmental conduct, (2) reduction in the incidence of such abuse, and (3) refinement of the administration of federal law. *Spencer v. N.L.R.B.*, 712 F.2d 539, 550 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 963 (1984), *see also, generally*, 28 U.S.C. § 2412(d).

As with the Civil Rights Act, the form and substance of EAJA is readily distinguishable from the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) ("FOIA"). Not only do the EAJA and FOIA employ completely different syntax and promote unique statutory concerns, FOIA makes the assessment of reasonable attorneys' fees and related litigation expenses

discretionary to the court. 5 U.S.C. § 552(a)(4)(E). As noted above, the EAJA *requires* that a court make such an award to the "prevailing party . . . unless the court finds that the positions of the United States was substantially justified." 28 U.S.C. 2412(d)(1)(A).

There was no basis in the record or under the law for the Court of Appeals to reverse the decision of the District Court and to deny attorneys' fees to Kooritzky and his independent legal team for their efforts against the DOL. At a minimum, the evidence submitted with regard to Kooritzky's success in the case on the merits, his *bona fide* attorney/client relationship with the members of his legal team, and the plain and clear language of the EAJA should have precluded reversal on this issue.

## II.

**An attorney/client relationship did, in fact, exist between the Petitioner and his outside legal counsel and, as such, Petitioner is entitled to recover fees and other expenses for his outside legal counsel's services. The relationship does not have to be "sufficient" under EAJA.**

It is undisputed that Kooritzky did have, a *bona fide*, actual, arms-length attorney/client relationship with his independent attorneys and the law student/legal assistant comprising his legal team. *See, Kooritzky v. Herman I*, 6 F. Supp. 2d at 3, 5-6. The Court of Appeals did not dispute the existence of such a bona fide attorney/client relationship but, in essence, held that it was not "sufficiently bona fide," an unprecedented holding. *Kooritzky Fee Appeal*, 178 F.3d at 1324.

As Kooritzky has contended all along, without substantial contradiction, his legal counsel assumed professional liability for their advice and services, had ethical obligations as attorneys to a client, kept records of time spent and expenses realized on Kooritzky's claim, spent substantial and successful hours on his behalf, and treated Kooritzky as a client in all respects.

In reaching its decision that no sufficiently bona fide attorney/client relationship existed between Kooritzky and his attorneys, the Court of Appeals discounted basic legal principles and precedents. Most notably, the Court of Appeals discounted the District Court's finding that Kooritzky and his attorneys did in fact have an attorney/client relationship, saying it was not "genuine." *See, Kooritzky v. Herman I*, 6 F. Supp. 2d at 1, 5-6; *Koortizky v. Herman II*, 6 F. Supp. 2d at 13.

As noted in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), however, the "clearly erroneous" principle of appellate review "does not entitle a reviewing court to reverse the finding of the [District Court] simply because it is convinced that it would have decided differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Anderson v. City of Bessemer City*, 470 U.S. 564; *see also, Urban Masonry Corp. v. N&N Contractors, Inc.*, 676 A.2d 26, 33 (D.C. 1996) (finding that "[w]hether an attorneys fees award is available is a matter [for] . . . the trial judge, unless there is an ambiguity that needs to be resolved.").

Nevertheless, in dismissing the unmistakably *bona fide* attorney/client relationship between Kooritzky and his outside lawyers, the Court of Appeals utilized several subjective requirements. For one, the court stated that "Kooritzky has not shown that his co-counsel evidenced the independence

necessary for recovery . . . under the EAJA." *Kooritzky Fee Appeal*, 178 F.3d at 1324. There is no known precedent, however, for the proposition that, although *bona fide*, an attorney eligible for attorney's fees also must be appropriately "independent." Certainly this language does not appear in EAJA directly or indirectly.

Also, the court noted none of Kooritzky's co-counsel entered an appearance during the merits phase. *See, Kooritzky Fee Appeal*, 178 F.3d at 1324. EAJA, however, *does not* require a formal entry of appearance, only that attorney's fees are "incurred." *See generally*, 28 U.S.C. § 2412(d). Indeed, it is common knowledge that where, for example, one or more, but not all, attorneys from a large firm enter an appearance, even those attorneys in the firm who do not themselves enter an appearance are entitled to fees.

In Kooritzky's case, for example, while Christopher A. Teras ("Mr. Teras"), one of Kooritzky's outside attorneys, initially did not enter a formal appearance on behalf of Kooritzky, he certainly represented Kooritzky and indeed ultimately appeared in court on his behalf at various times. *Kooritzky v. Herman I*, 6 F. Supp. 2d at 11 (noting that "[j]udging from his appearances before this Court, [Christopher] Teras provided able assistance to [Kooritzky].") Moreover, Mr. Teras appeared before the Court of Appeals in Kooritzky's appeal on the merits as far back as December 1993 where Mr. Teras formally introduced another attorney, who presented Kooritzky's argument to the Court of Appeals. In today's world of specialization and multi-person legal teams, it is commonplace for only one or two attorneys to enter an appearance in a matter. Certainly this does not preclude the rest of the legal team from recovering fees for work provided.

Concerning a third basis for the Court of Appeals to disregard the actual attorney/client relationship, the tribunal noted that Kooritzky did not enter into written fee agreements with his attorneys, and they did not send him any bills. *See, Kooritzky Fee Appeal,* 178 F.3d at 1323. Yet, as noted above, however, it is well-settled that a fee agreement is not necessary to establish an attorney/client relationship. *See, Matter of Lieber,* 442 A.2d 153 (D.C. App. 1982).

Finally, as a fourth ground for disregarding Kooritzky's *bona fide* attorney/client relationship, the Court of Appeals asserted that Kooritzky's lawyers did not provide the function recognized in *Kay* of "filtering out meritless claims." *Kooritzky Fee Appeal,* 178 F.3d at 1324. The Court of Appeals insisted that "[Kooritzky] himself acted as sole trial counsel." *Id.*

Such an argument is not supported in the record for several reasons. First, Kooritzky's claims before the District Court certainly were meritorious; it is undisputed that he ultimately prevailed on the *only* claim he advanced, concerning inadequate notice and comment pursuant to the rule of the APA. Further, it is inaccurate to state that Kooritzky was "sole trial counsel." At a minimum, *there was no trial.* The District Court merits phase primarily was a paper case, with in-court appearances limited to a handful of short hearings at the beginning. Kooritzky's independent legal team had ample opportunity outside the courtroom to help him "filter out meritless claims;" certainly they were eminently successful. It is evident from the record that the Court of Appeals has erroneously denied Kooritzky's fee award.

## III.

**Proper fee awards pursuant to 28 U.S.C. § 2412(d)(2)(A) include the reasonable cost of study and analysis and, as such, Petitioner is entitled to a fee award for services of an independent expert paralegal based on prevailing market rates for the kind and quality of the services furnished. Thomas Moore was a member of the independent legal team and is thus entitled to compensation under EAJA.**

District Judge Oberdorfer had no difficulty recognizing law clerk/law student Thomas Moore's contribution, and, as such, his entitlement to a fee recovery *Kooritzky v. Herman I*, 6 F. Supp. 2d at 12-13, *see also, Kooritzky v. Herman II*, 6 F. Supp. 2d at 16-22. The only difficulty the District Court encountered in assigning fees for Moore's work was *how much he was entitled to receive* for the services he provided. *Kooritzky v. Herman I*, 6 F. Supp. 2d at 13. Again, the Court of Appeals dismissed Judge Oberdorfer's findings and without offering any support, curtly stating that Moore "was neither eligible for nor did he receive any sort of fees." *Kooritzky Fee Appeal*, 178 F.3d at 1324.

It is common for law firms to bill clients for the time their law clerks and paralegal staff spend. As such, these fees are recoverable under EAJA. As Judge Oberdorfer noted, the law in the District of Columbia is that "'paralegals and law clerks are compensated at their market rate' when calculating statutory fee awards." *Kooritzky v. Herman I*, 6 F. Supp. 2d at 6 (citing *In re Donovan*, 877 F.2d 982, 992 n.20 (D.C. Cir. 1989). This Court held in *Missouri v. Jenkins* that fee awards should cover separately billed paralegal time. *Missouri v. Jenkins*, 491 U.S. 274, 287-88 (1989). *See also, S.E.C. v.*

*Waterhouse*, 41 F. 3d 805, 809 (2d Cir. 1994) ( noting that a fee award should include consideration of services of non-attorneys and expenses.).

If the Court of Appeals was not satisfied with Judge Oberdorfer's decision to allow fees for Moore, it should have remanded the matter to the District Court with instructions. It was clearly improper appellate action to overrule a trial court's finding of fact without an appropriate citation of "clear error."

## CONCLUSION

For the reasons cited above, Petitioner respectfully requests this Honorable Court grant writ of certiorari in this case.

Dated this 20th day of November, 1999.

Respectfully submitted,
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# KOORITZKY v. HERMAN

**Cite as 6 F.Supp.2d 1 (D.D.C. 1997)**

**Samuel G. KOORITZKY, Plaintiff,**

**v.**

**Alexis M. HERMAN, Secretary of Labor,[1] Defendant.**

**No. CIV. A. 91-3011-LFO.**

United States District Court,
District of Columbia.

Dec. 17, 1997.

Pro se attorney-plaintiff, having blocked enforcement of an immigration regulation as violative of notice and comment procedures, 17 F.3d 1509, sought prevailing party attorney fees under the Equal Access to Justice Act. On objections to a Report and Recommendation issued by United States Magistrate Judge Alan Kay, the District Court, Oberdorfer, J., held that: (1) Magistrate Judge had jurisdiction to issue the Report and Recommendation; (2) plaintiff's status as an pro se attorney did not eliminate his right to a fees award; (3) plaintiff was a prevailing party; (4) the government's position was not substantially justified; and (5) the fees of other attorneys and a legal assistant who helped plaintiff on the case could be included in the award.

Ordered accordingly.

**1. United States Magistrates 15.1, 18.1**

Magistrate judge had jurisdiction to issue a Report and Recommendation on a referral of a motion for prevailing party attorney fees under the Equal Access to Justice Act in an immigration case. 28 U.S.C.A. §§636(b)(1), 2412(b); Fed.Rules Civ.Proc. Rules 54(d)(2), 72(b), 28 U.S.C.A.; U.S. Dist. Ct.Rules D.C. Local Rule 504.

**2. United States 147(7)**

Pro se plaintiff's status as an attorney did not eliminate his right to seek prevailing party attorney fees under the Equal Access to

1. Alexis M. Herman was sworn in as Secretary of Labor on May 9, 1997. Pursuant to FRCP 25(d)(2), she is substituted for Robert Reich, who left that office on January 12, 1997.

Justice Act after blocking enforcement of an immigration regulation as violative of notice and comment procedures, particularly since he tried several times to obtain other counsel. 28 U.S.C.A. §2412(d)(1)(A).

**3. United States 147(9)**

Plaintiff who blocked enforcement of an immigration regulation as violative of notice and comment procedures was a "prevailing party" entitled to seek attorney fees under the Equal Access to Justice Act. 28 U.S.C.A. §2412(d)(1)(A).

See publication Words and Phrases for other judicial constructions and definitions.

**4. United States 147(10)**

Federal government's position opposing plaintiff's challenge to an immigration regulation as violative of notice and comment procedures was not "substantially justified," and thus plaintiff could seek prevailing party attorney fees under the Equal Access to Justice Act, where the Court of Appeals made acerbic comments on the merits of the position, even though the Court did not use the precise language of the statute. 28 U.S.C.A. §2412(d)(1)(A).

See publication Words and Phrases for other judicial constructions definitions.

**5. United States 147(4)**

Pro se attorney-plaintiff "incurred" the fees of the four other attorneys who helped him block enforcement of an immigration regulation as violative of notice and comment procedures, and thus those fees could be included in plaintiff's award of prevailing party attorney fees under the Equal Access to Justice Act, even though he had no formal agreement with the other attorneys. 28 U.S.C.A. §2412(d)(1)(A).

See publication Words and Phases for other judicial constructions and definitions.

**6. Attorney and Client 64**

Neither a written agreement nor the payment of fees is necessarily required to establish an attorney-client relationship.

**7. Attorney and Client 130**

Written contract is not necessary to create a legal obligation to compensate one's attorney; theories of implied contract or quantum meruit can apply.

**8. United States 147(4)**

Pro se attorney-plaintiff who blocked enforcement of an immigration regulation as violative of notice and comment procedures could get prevailing party attorney fees under the Equal Access to Justice Act for a legal assistant who worked on the case while he was "reading" for the bar exam under the supervision of another attorney in plaintiff's firm, though only to the extent he performed legal work. 28 U.S.C.A. §2412(d)(1)(A).

**9. United States 147(4)**

Pro se attorney-plaintiff who blocked enforcement of an immigration regulation as violative of notice and comment procedures was entitled to $51,920.51 in prevailing party attorney fees under the Equal Access to Justice Act. 28 U.S.C.A. §2412(d)(2)(A).

**10. United States 147(11.1)**

Pro se attorney-plaintiff who blocked enforcement of an immigration regulation as violative of notice and comment procedures was not entitled to a "special factor" adjustment for his expertise in immigration law in figuring his award of prevailing party attorney fees under the Equal Access to Justice Act, particularly since he prevailed on a routine issue of adiminstrative law. 28 U.S.C.A. §2412(d)(1)(A).

**11. United States 147(4)**

Pro se attorney-plaintiff who blocked enforcement of an immigration regulation as violative of notice and comment procedures was entitled to $36,861.93 for the services of one of the four attorneys who helped him on the case, in figuring plaintiff's award of prevailing party attorney fees under the Equal Access to Justice Act. 28 U.S.C.A. §2412(d)(2)(A).

**12. United States 147(6)**

Two attorney's general affidavits reporting 25 and 40 hours of work respectively could not support an award of prevailing party attorney fees under the Equal Access to Justice Act, where they did not show what work was performed, whether the expenditure of hours was reasonable, and whether the work was duplicative of that performed by other attorneys. 28 U.S.C.A. §2412(d)(1)(A).

**13. United States 147(4)**

Pro se attorney-plaintiff who blocked enforcement of an immigration regulation as violative of notice and comment procedures was entitled to $10,827.10 for the services of one of the four attorneys who helped him on the case, in figuring plaintiff's award of prevailing party attorney fees under the Equal Access to Justice Act. 28 U.S.C.A. §2412(d)(2)(A).

**14. United States 147(3.1)**

Charges for taxi fares and postage cannot be included in an award of prevailing party attorney fees under the Equal Access to Justice Act. 28 U.S.C.A. §2412(d)(2)(A).

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Christopher A. Teras, Jaeger & Teras, Washington, DC, for Plaintiff.

Samuel Kooritzky, Kooritzky & Associates, Arlington, VA, pro se.

Michael Joseph Ryan, U.S. Attorney's Office, Washington, DC, for Defendant.

*MEMORANDUM ON ATTORNEYS' FEES*

OBERDORFER, District Judge.

Plaintiff, Samuel G. Kooritzky, is an attorney specializing in immigration matters. He also sought to employ an alien for whom he was seeking certification as an "employment-based" immigrant. Plaintiff brought an action against the Secretary of Labor ("DOL") to bar enforcement of a regulation which would have stopped a pre-existing practice whereby an "employment-based" immigrant applicant could be certified for admission as a substitute for

another. *See Kooritzky v. Reich,* 17 F.3d 1509 (D.C.Cir.1994). The defendant prevailed in this court. *Kooritzky v. Martin,* 1992 WL 172572 (July 1, 1992) (D.D.C.1992). The Court of Appeals reversed on the ground that DOL had adopted the new regulation without adequate notice an comment. *Kooritzky v. Reich,* 17 F.3d 1509 (D.C.Cir.1994). The plaintiff, himself an attorney, prosecuted this claim *pro se*, assisted from time to time by four other attorneys, principally Christopher Teras. Substantial assistance was also rendered by law clerk James Moore, who was "reading" for the Virginia bar exam under the supervision of an attorney at plaintiff's law firm.

Plaintiff claims compensation for himself and his colleagues in the amount of $485,334.43, pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412(b) ("the Act"). A July 17, 1996 Order referred to Magistrate Judge Alan Kay for recommendation the question of "whether plaintiff is entitled under the Equal Access to Justice Act ... to compensation for legal services and expenses and, if so, the amount thereof." After conducting seven days of hearings, Magistrate Judge Kay has filed a careful and thorough Report and Recommendation ("R & R") that plaintiff receive an award of $31,798.71.

Both parties have filed objections to Magistrate Judge Kay's Report and Recommendation. The defendant attacks his legal conclusions; plaintiff challenges other legal premises of the Report and many of the findings of fact. The accompanying Order adopts some of the recommendations and reconfigures others.

## I.

### A.

[1] The parties' objections trigger *de novo* review by this Court. *See* FRCP 54(d); FRCP 72(b); Local Rule 504(c). Several are without merit. As a preliminary matter, plaintiff contends that the magistrate judge exceeded his jurisdictional authority in issuing the Report and Recommendation. Federal Rule of Civil Procedure 54(d)(2) authorizes a court to "refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispostive

pretrial matter." Rule 72(b), codified at 28 U.S.C. §636(b)(1), is the federal analog to Local Rule 504, which permits magistrate judges to respond to dispositive motions with recommendations, but not orders.[2]

**[2]** More substantively, defendant objects that plaintiff's status as a *pro se* litigant precludes him from obtaining any attorneys' fees. However, circuit law establishes that an attorney who represents himself and, in the words of the Act (28 U.S.C. §2412(d)(1)(A)) is "the prevailing party ... in any civil action" is entitled to an award of "fees and other expenses" unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. *See Jones v. Lujan,* 887 F.2d 1096, 1097 (D.C.Cir. 1989). Cases construing other fee-shifting statutes have not overruled *Lujan. Compare Kay v. Ehrler,* 499 U.S. 432, 111 S.Ct. 1435, 113 L.Ed.2d 486 (1991) (FOIA); *Benavides v. Bureau of Prisons,* 993 F.2d 257 (D.C.Cir.1993) (Civil Rights Act); *see also Burka v. Department of Health & Human Services,* Civ. A. No. 92-2636, Memorandum and Order of March 21, 1997 (D.D.C.1997), *appeal filed* May 15, 1997 (FOIA). Moreover, plaintiff has presented a persuasive argument that the Act differs in both language and purpose from the attorneys' fee provisions of the Civil Rights Act and the Freedom of Information Act. *See* Plaintiff's Reply To and Clarification of Defendant's Notice to the Court Regarding Recent Case Law (137-1); *Spencer v. NLRB,* 712 F.2d 539, 550 (D.C.Cir.1983) (enumerating purposes of the Equal Access to Justice Act).

The *Jones v. Lujan* ruling seems particularly germane to the situation here, where plaintiff attempted on several occasions to obtain other counsel, but the attorneys he approached were either unwilling to assume responsibility for the case, or demanded fees beyond his means. For example, attorney Christopher Teras testified that Kooritzky asked him to serve as lead counsel in the case, but that "I had my own obligations in my office, and I just didn't feel that I could make a commitment to be lead attorney as

2. The Report and Recommendation stated that the case "was referred to the undersigned for a Report and Recommendation pursuant to 28 U.S.C. §636(b)(1) and Local Rule 504."

such." Hrg. Tr. of Jan. 24, 1997 at 24. Teras did agree to assist plaintiff as much as he was able. *Id.* Kooritzky also testified that he approached other attorneys who declined to take on the case. Hrg. Tr. of Jan. 15, 1997 at 30-31. Kooritzky also informed the court that

> a limited number of attorneys were willing to take his case. However, these attorneys demanded a retainer in addition to the attorney fees that would be recouped under 28 U.S.C. §2412.... Moreover, the attorneys that were willing to accept the case advised the Plaintiff that it would take a considerable amount of time to collect their legal fees if they won the case, which caused them to state they wanted higher fees than those allowed by statute and much higher than those being requested by the Plaintiff herein.
>
> Lastly, the attorneys that were willing to take the case demanded their fees in advance, and the Plaintiff could thereafter recoup the legal fees and expenses from the Government. Furthermore, these attorneys demanded their legal fees paid whether or not they won the case.

Resp. to Def's Opp. to Atty. Fees (55-1) at 6-7. As our Court of Appeals recognized in *Spencer v. NLRB*, the purpose of the Act was not only not "provide relief to victims of abusive governmental conduct," but to "induce [government] administrators to behave more responsibly in the future," and "to foster greater precision, efficiency and fairness ... in the formulation and enforcement of governmental regulations." 712 F.2d at 550. By presenting this suit, Kooritzky clarified for the Labor Department its obligations under the notice and comment requirements of the Administrative Procedures Act; the fact that he himself was the only attorney willing to challenge the Department makes him no less entitled to compensation for the legal work required to do so.

B.

**[3,4]** As stated in the Report and Recommendation, the Act entitles plaintiff to an award of attorneys' fees only if (1) he was the "prevailing party"; (2) he "incurred" the expenses; (3) his net worth is below the statutory ceiling, and (4) the position of the United States in the underlying litigation was not "substantially justified." R & R at 3. Magistrate Judge Kay correctly concluded that plaintiff

was the prevailing party, in that the Court of Appeals agreed that DOL had violated the Administrative Procedure Act by issuing the disputed regulation without appropriate notice and comment. Moreover, without saying so in the precise language of the statute, the Court of Appeals' acerbic comments on the merits must mean that they thought the DOL position was not substantially justified. As the Panel put it:

> Because the 'logical outgrowth' formulation may be merely another way of asking how much notice is enough, ... answering the question may prove difficult in some cases. this is not one of them
>
> The ... interim final rule does not even come close to complying with the notice requirement....

17 F.3d at 1513. *See Oregon Natural Resources Council v. Madigan,* 980 F.2d 1330, 1332 (9th Cir.1992) (No substantial justification where the government "lost on an issue of statutory interpretation that the previous panel did not consider close."); *Estate of Smith,* 930 F.2d 1496, 1502 (10th Cir.1991) ("... the fact that a district court has upheld the agency's decision does not establish that the agency's position was substantially justified.")

There is no dispute that plaintiff meets the net worth requirements of the the Act. *See* R & R at 5. The remainder of the objections—from the plaintiff—concern the analysis and calculation of fees and expenses "incurred."

## II.

### A.

Plaintiff played a dual role in this litigation. Although he conceded that he had litigating experience, he participated in the advocacy role of an attorney, albeit for himself. *See Jones v. Lujan, supra.* For that he is entitled to a fee award measured by the statutory and judicial standards applicable to fee shifting. He also participated as an expert in immigration law as a supporter of his colleagues in the "study ... and analysis"of the specialized immigration law and policy issues presented by this litigation. Section 2412(d)(2)(A) entitles him to an award of the"*reasonable*

cost of any study ... and analysis necessary for the preparation of the party's case and *reasonable* attorney fees." (Emphasis added.)

**[5]** While the magistrate judge recommended that plaintiff be compensated for his own work on the case, he concluded that the fees attributed to other attorneys are not compensable under the Act, on the grounds that they were not "incurred" by plaintiff. Specifically, the Report and Recommendation noted the absence of any formal agreement between plaintiff and his colleagues concerning fees for legal services rendered. "Because Kooritzky incurred no expense or obligation to pay for [their] work, he may not recover any fees from the government for that work." R & R at 34. The arrangements between plaintiff and his colleagues, as described in the Report and Recommendation, are unusual. Christopher Teras "declined to act as lead counsel, but agreed to assist when he could.... Kooritzky incurred no expense or obligation to pay for Teras's work." R & R at 33. With respect to Margot Champagne, the Report & Recommendation cites plaintiff's testimony that " 'there was no formal agreement, written or even formally verbal ... on how they would get paid, or if they would get paid. Nobody expected to get paid.' " R & R at 39. As for Ronald Von Neumann, "Kooritzky had no arrangement to pay ... for his services.... According to Plaintiff ... '[Von Neumann] was happy to contribute something.' " R & R at 39.

**[6, 7]** As plaintiff notes, neither a written agreement nor the payment of fees is necessarily required to establish an attorney-client relationship. *See* Plaintiff's Supplement to Objections; *Matter of Lieber,* 442 A.2d 153 (D.C.App.1982); Va. St. S.Ct. Pt. 6 §1(B). Nor, under theories of implied contract or *quantum meruit,* is a written contract necessary to create a legal obligation to compensate one's attorney. 10 *Williston on Contracts* §1285A (3d ed. 1967) ("In situations where an express agreement is lacking ... the attorney is entitled to reasonable compensation for services performed on a *quantum meruit* basis"). Plaintiff argues that he had "contingent contract" relationships with three of his four colleagues; such "contingent contracts" have also been held to compensable under the Act. *See Phillips v. General Services*

*Adm'n*, 924 F.2d 1577 (Fed.Cir. 1991) (granting award to plaintiff whose retainer agreement provided that she owned no additional fees to her attorney unless she obtained a statutory fee award).

However, it is unnecessary to analyze plaintiff's legal obligations (if any) to his colleagues, because the existence of such obligations does not necessarily determine whether a party has "incurred" fees and expenses under the Act. Our Court of Appeals has squarely addressed the question, and held that "the mere non-existence of liability for legal fees between client and counsel does not automatically disqualify a plaintiff from recovering attorneys' fees." *American Ass'n of Retired Persons v. EEOC*, 873 F.2d 402, 406 (D.C.Cir.1989). In *AARP*, the court awarded attorneys' fees under §2412 to plaintiffs represented by *pro bono* counsel, *i.e.*, where there was an express agreement that the parties were *not* obliged to pay their attorneys. As the Court of Appeals noted in *Unification Church v. I.N.S.*, 762 F.2d 1077 (D.C.Cir.1985), such an award finds support in the legislative history of the Act: "computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client." *Id.* at 1083, *citing* H. Rep. No. 96—1418 (1980) at 15. *Cf. Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C.Cir.1995) ("the prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals."); *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1521 (D.C.Cir. 1988) ("It is not inconsistent with the avoidance of windfalls to pay attorneys at rates commensurate with prevailing community standards of attorneys of like expertise doing the same sort of work in the same area").

It is not disputed that these three attorneys performed legal work on behalf of plaintiff. *Cf. American Ass'n of Retired Persons v. EEOC*, 873 F.2d 402 (D.C.Cir.1989) (denying plaintiff's fee request for attorneys who served as lead counsel, but who were counsel of record only for co-plaintiff). Nor is this a case where a third party assumed financial responsibility for plaintiff's attorney

fees and costs. *Cf. United States v. Paisley,* 957 F.2d 1161 (4th Cir.1992) (defendants did not "incurr" expenses that were indemnified by their former employer).[3] Teras, Champagne and Von Neumann assisted plaintiff in his successful challenge to a government regulation; as such, they are entitled to compensation under the Act.[4]

Plaintiff's fourth colleague, Sean Purcell, was a contract attorney paid by Teras to work on plaintiff's case. The Report & Recommendation disallowed Purcell's fees on the grounds that they were incurred by Teras, not Kooritzky. R & R at 40, 38. Having now established that Teras's fees are compensable under the Act, it follows that his expenses are as well.

**B.**

**[8]** The remaining individual on plaintiff's legal team was legal assistant Thomas Moore, Sr. Moore was not an employee of Kooritzky or his firm, but was "reading" for the Virginia bar examination under the supervision of another firm attorney. Moore was required to devote 18.5 hours per week to that project, and was prohibited from accepting compensation for any legal work he might perform while "reading." R & R at 2. Moore agreed to work on plaintiff's lawsuit during his remaining time. *Id.* Plaintiff did not

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3. A comparison of *AARP* and *Paisley* suggests that the purpose of the "incurred" requirement is to prevent the recoupment of fees by parties who do not meet the net worth requirements of the Act. In *AARP*, a small non-profit organization and an individual plaintiff submitted a fee application not only for their own lawyers, but for lead counsel retained by co-plaintiff AARP, whose net worth made it ineligible for a fee award under the Act. In *Paisley*, it was the Boeing Corporation that had indemnified its former employees in a suit where the corporation was a co-defendant. *See Unification Church,* 762 F.2d at 1082 ("organizations obviously not qualified for an award ... would be able to persuade individuals to be among the parties, and the organization would then receive free legal services if its side were to prevail").

4. *Pro bono* arrangements in challenges to government regulations, and the recovery of fees thereon, are not limited to cases involving nonprofit organizations or indigent individuals. *Cf National Ass'n of Mfgrs. v. Dep't of Labor,* 962 F.Supp. 191 (D.D.C.1997) (granting §2412 attorneys' fees to the National Association of Manufacturers, whose counsel served on a *pro bono* basis).

the preparation of plaintiff's case as an independent contractor, and would be reimbursed if fees were recovered. R & R at 36.

The Report & Recommendation concluded that plaintiff was not entitled to fees for work performed by Moore, based on the holding of *Ashton v. Pierce*, 580 F.Supp. 440, 443 (D.D.C.1984), that a prevailing plaintiff can recover only the "actual salary cost" of a legal assistant—which in Moore's case, is zero, R & R at 33—37. Although *Ashton v. Pierce* was cited by the defendant, its holding is not the law of this circuit, which is that "paralegals and law clerks are compensated at their market rate" when calculating statutory fee awards. *In re Donovan*, 877 F.2d 982, 992 n. 20 (D.C.Cir.1989) (citations omitted). In *Missouri v. Jenkins*, the Supreme Court analyzed the question of paralegal fees in some detail, and concluded that fee awards should cover separately billed paralegal time. 491 U.S. 274, 287—88, 109 S.Ct.2463, 2471—72, 105 L.Ed.2d 229 (1989). Although the *Jenkins* court addressed the question in the context of 42 U.S.C. §1988, its analysis was not based on that statute, but on an assessment of how attorneys have historically accounted for paralegal costs in the billing of legal services. *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 99, 111 S.Ct. 1138, 1147, 113 L.Ed.2d 68 (1991). Its reasoning is thus equally applicable to the Equal Access to Justice Act, which—like the statute at issue in *Jenkins*—provides that a fee award "shall be based on prevailing market rates." 28 U.S.C. §2412(d)(2)(A).

Like Teras, Champagne and Von Neumann, Moore was a member of the *pro bono* legal team assembled by plaintiff. His time is thus compensable under the Act to the extent that he was performing legal work. *See Missouri v Jenkins*, 491 U.S. at 288 n. 10, 109 S.Ct.2463 ("purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them"); *American Petroleum Inst. v. U.S. Environmental Protection Agency, 72 F.3d 907 (D.C.Cir.1966) (substracting from fee request hours billed by attorneys and paralegals for delivering documents to the court).*

## III.

### A.

[9] Having established which members of plaintiff's legal team are eligible for attorney fees, the next issue is the amount of their fees for which plaintiff may be reimbursed. Plaintiff is entitled, by § 2412(d)(2)(A) to an award of "reasonable attorneys' fees" at "prevailing market rates for the kind and quality of services furnished" subject to the ceiling established by § 2412(d)(2)(A)(ii). Contrary to the objections filed on behalf of the United States, § 2812 provides that "fees and other expenses *includes*[5] the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorneys' fees." *See West Virginia University Hospital, Inc. v. Casey*, 499 U.S. 83, 91, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991); *S.E.C. v. Price Waterhouse*, 41 F.3d 805, 809 (2nd Cir. 1994).

Magistrate Judge Kay well states the standards established by the courts for the calculation of the amount of an award from the government pursuant to the various fee shifting statutes.

> "[N]o compensation is due for nonproductive time." *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C.Cir. 1980). Redundant or excessive hours are not compensable. *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). "Similarly, no compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail." *Copeland*, 641 F.2d at 891-92.
>
> The applicant must submit an itemized statement from each attorney "stating the actual time expended and the rate at which fees and other expenses were computed." 28 U.S.C. § 2412(d)(1)(B). "An applicant for attorneys' fees is only entitled to an award for time reasonably expended. Thus the fee application must also contain sufficiently detailed information

5. The United States Objections deceptively interpret the word "includes" to mean "limit." *See* United States Objections at 2.

about the hours logged and the work done." *National Assoc. of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C.Cir. 1982). The party seeking attorney fees "bears that burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933. "Casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorney's fees. Attorneys who anticipate making a fee application must maintain contemporaneous and standardized time records which accurately reflect the work done by each attorney." *National Assoc. of Concerned Veterans*, 675 F.2d at 1327.

R & R at 3-4.

**B.**

Plaintiff represented on May 6, 1996, that he worked on this case for 1,043.5 hours for which he claimed a base fee award of $127,306.20 and an additional $104,350 as a "special factor" adjustment. The Magistrate Judge conducted five days of evidentiary hearings. From the testimony there and from the extensive documentary record he found that because plaintiff lacked the necessary contemporaneous time records, plaintiff "was unable to confirm many . . . seemingly excessive hours worked, or to provide explanations for double billings and periods during which he claims to have worked more than 24 hours in a day." R & R at 9. Indeed, the Magistrate Judge, considering the fact that plaintiff worked on this case primarily after his regular business hours, was skeptical that plaintiff could have possibly worked the number of hours claimed. R & R at 10. In addition, the Magistrate Judge found that a large portion of the time for which plaintiff seeks compensation "was admittedly expended as a result of [plaintiff's] lack of experience and expertise in the field." R & R at 9. Plaintiff conceded on deposition: "Research, gosh, I shouldn't even talk about the research we did but, you know, we knew nothing. All we knew was immigration. I still personally don't know how to do a court case." *Id.* There was a further finding that neither plaintiff nor his assistant, Moore, "had ever prepared a

complaint before, and [plaintiff] admitted that they prepared so many drafts, it was ridiculous." *Id.* Other work, claimed to have consumed over 150 hours, was perceived by the Magistrate Judge to be demonstrably redundant. Finally, the Magistrate Judge eliminated from consideration "time spent on issues on which [plaintiff] did not prevail." For as the Supreme Court has opined: "[W]ork on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' " *See Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

Applying these guidelines to the facts, the Magistrate Judge painstakingly itemized the fee claims, approving some, adjusting some, and disallowing some. His methodology is unexceptional. However, on review, some adjustment is required.

The observations of the Magistrate Judge about plaintiff's failure to maintain satisfactory records of his time and his candidly admitted absence of court experience are well taken. These two factors impair plaintiff's claim. Not incidentally, the plaintiff's inexperience and disorderly recordkeeping imposed an enormous and unnecessary burden on the Court and the Magistrate Judge.[6]

For example, the Magistrate Judge recommends disallowance of any award measured by the time plaintiff devoted to obtaining interim payment. On that aspect of the matter plaintiff did not prevail and is not entitled to compensation.

On the other hand, the Magistrate Judge recommended denial of any award reflecting time spent by plaintiff in his attempt to join the INS and the motion to compel compliance. Plaintiff's opposition correctly points out, however, that DOL's ruling was inextricably linked with INS policy and actions. While plaintiff did not fully succeed in joining INS formally as a party, he did succeed in obtaining an order which required DOL to use its good offices to seek INS action. Accordingly, some, but not all the time spent on that endeavor should be considered as a basis for an award.

6. Fortunately, for the Court of Appeals, plaintiff was represented there by apparently able, and as matters turned, successful lead counsel.

The same considerations obtain with respect to the Motion to Compel. After the plaintiff filed the motion defendant took the action sought, thereby mooting plaintiff's claim. Therefore, the time required for that effort is entitled to recognition.

While the poor recordkeeping is to be deplored, the Magistrate Judge worked his way through the maze to recognize some time charges which were prepared and recorded in a very crude and inefficient manner. Plaintiff points to support for this approach in Supreme Court and Circuit Court decisions. The *Hensley* Court observed, for example that:

> Plaintiff's counsel, of course, is not required to record in great detail how each minute of time was expended. But at least counsel should identify the general subject matter of his time expenditure.

461 U.S. at 438 n. 12, 103 S.Ct. 1933. *See also Jean v. Nelson*, 863 F.2d 759, 772 (11th Cir. 1988), *aff'd Commissioner v. Jean*, 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990). Moreover, the inefficient are entitled to compensation measured by the time a reasonably efficient counsel should spend on a task. Here some of the recommendations ask too much of successful, albeit awkward, counsel in this protracted litigation.

Finally, plaintiff is entitled to be compensated for some, though not all, of the time billed in conjunction with his fee request, notwithstanding the fact that some of that work was completed after submission his initial fee request. Moreover, some of the hours spent by plaintiff on this must be attributed not to his incompetence, but to the vigor with which the defendant opposed his motion.

For the foregoing reasons, the specific recommendations of Magistrate Judge Kay to grant plaintiff's request are modified as follows:

A. *1991* (Total Granted: 136 hours)

1. 10/30/91. Granted: 3 hours. The entry is adequately descriptive to justify three hours, where the interim and final rules were lengthy and detailed.

2. 11/12/91-11/17/91; 11/19/91-11/26/91. Granted: 80 hours. Plaintiff claimed compensation measured by 144 hours of work to "Review, draft, and redraft Injunction for submission to the Court consistent with the rules of the Court and with applicable case law." Whether plaintiff knew it or not F.R.Civ. P. 11 imposed upon him, as attorney for himself, a very high standard of care in the launching of a litigation and threatened sanctions for failure to comply with its structures. It may be that 144 hours were more than was reasonably necessary for this task. But it could reasonably require an efficient attorney at least a 40 hour week of work, starting from ground zero, to file this case in a manner that would pass muster under Rule 11.

3. 11/27/91. Granted: 1 hour. Plaintiff charged an hour for "correspondence" with U.S. Attorney General, Secretary of Labor and U.S. Attorney advising them of filing for an Injunction. The Report and Recommendation disallowed credit for the hour because plaintiff "does not specify the work performed." However, "correspondence" in the shorthand of time charges means "writing letters." That hour should be credited

B. 1992 (Total Granted: 87.5 hours)

1. 8/12/92, 8/16/92, 8/18/92, 8/31/92. Granted: 35 hours. The entries essentially refer to the preparation of plaintiff's appeal, a task which might reasonably consume 35 hours.

2. 9/21/92-9/22/92. Granted: 0 hours. Defendants prevailed in their motion for summary affirmance before the Court of Appeals. *See Kooritzky v. Reich*, 1993 WL 191787 (D.C.Cir. 1993).

3. 9/22/92-9/27/92, 9/29/92-10/5/92. Granted: 0 hours. Defendants prevailed in their motion for summary affirmance before the Court of Appeals. *See Kooritzky v. Reich*, 1993 WL 191787 (D.C.Cir. 1993).

C. *1993* (Total Granted: 142.5)

1. 8/17/93-8/22/93. Granted: 20 hours. The case file contained lengthy and complex documents relevant to plaintiff's appeal.

2. 9/5/93-9/12/93. Granted: 30 hours. Review and revision could reasonably consume this amount of time. To the extent that plaintiff spent some of this time reading cases cited by his legal assistant, it was time well spent.

3. 11/12/93-11/15/93, 11/21/93-11/23/93. Granted: 40 hours. This is a reasonable amount of time to review and analyze defendants' appellate brief and the cases cited therein.

4. 11/16/93-11/20/93, 11/24/93-11/26/93. Granted: 35 hours. Thirty-five hours could reasonably be expended on this activity.

D. *1994* (Total Granted: 44.1 hours)

1. 8/2/94. Granted: 2 hours. The cited research related to defendant's proposed implementation order.

2. 9/21/94. Granted: 2.25 hours. Plaintiff achieved a partial victory on this issue.

3. 9/22/94. Granted: 2.0 hours. Plaintiff achieved a partial victory on this issue.

4. 9/23/94. Granted: .75 hours. Plaintiff achieved a partial victory on this issue.

E. *1995* (Total Granted: 30.75)

1. 6/30/95. Granted: 1.5 hours. For reasons stated above, plaintiff is entitled to some, though not all, of the hours requested for work related to his request for attorney fees.

2. 7/6/95. Granted: 1 hour. For reasons stated above, plaintiff is entitled to some, though not all, of the hours requested for work related to his request for attorney fees.

3. 7/19/95. Granted: .5 hours. For reasons stated above, plaintiff is entitled to some, though not all, of the hours requested for work related to his request for attorney fees.

4. 8/14/95, 8/28/95. Granted: 1 hour. For reasons stated above, plaintiff is entitled to some, though not all, of the hours requested for work related to his request for attorney fees.

5. 8/29/95. Granted: 2 hours. For reasons stated above, plaintiff is entitled to some, though not all, of the hours requested for work related to his request for attorney fees.

6. 10/2/95. Granted: 2 hours. Plaintiff billed 2 hours for preparing for a court hearing. Although plaintiff did not specify the nature of the hearing, docket entries reveal that there was a status hearing on the following day that date which served the purpose of the court.

7. 10/3/95. Granted: 2 hours. Plaintiff claims credit for 2 hours attending a court hearing on 10/3/95. The Recommendation would credit no time for attendance at that hearing because plaintiff failed to state its purpose. Docket entries reveal that there was a status hearing on that date which served the purpose of the court; plaintiff is entitled to credit for attending it. Travel and waiting time plus the time of the hearing could reasonably consume 2 hours.

8. 10/9/95. Granted: 2 hours. For reasons stated above, plaintiff is entitled to some, though not all, of the hours requested for work related to his request for attorney fees.

9. 10/11/95. Granted: 2 hours. For reasons stated above, plaintiff is entitled to some, though not all, of the hours requested for work related to his request for attorney fees.

10. 10/16/95. Granted: .75 hours. For reasons stated above, the plaintiff is also entitled to partial compensation for work on the semi-successful Motion to Compel.

11. 10/17/95. Granted: .75 hours. For reasons stated above, the plaintiff is also entitled to partial compensation for work on the semi-successful Motion to Compel.

12. 10/18/95. Granted: .75 hours. For reasons stated above, the plaintiff is also entitled to partial compensation for work on the semi-successful Motion to Compel.

13. 10/19/95. Granted: .75 hours. For reasons stated above, the plaintiff is also entitled to partial compensation for work on the semi-successful Motion to Compel.

14. 10/30/95. Granted: .5 hours. For reasons stated above, the plaintiff is also entitled to partial compensation for work on the semi-successful Motion to Compel.

15. 11/15/95. Granted: .75 hours. For reasons stated above, the plaintiff is also entitled to partial compensation for work on the semi-successful Motion to Compel.

16. 11/20/95. Granted: .75 hours. For reasons stated above, the plaintiff is also entitled to partial compensation for work on the semi-successful Motion to Compel.

17. 11/21/95. Granted: .75 hours. For reasons stated above, the plaintiff is also entitled to partial compensation for work on the semi-successful Motion to Compel.

18. 11/23/95. Granted: 1.5 hours. For reasons stated above, the plaintiff is also entitled to partial compensation for work on the semi-successful Motion to Compel.

Substituting these revised hourly totals for those contained on page 32 of the Report and Recommendation, Kooritzky is entitled to the following fees for his own work:

| | | | | | | |
|---|---|---|---|---|---|---|
| 1991: | 136 | hrs. | × | $113.48 | = | $15,433.28 |
| 1992: | 87.5 | hrs. | × | $116.33 | = | $10,178.88 |
| 1993: | 142.5 | hrs. | × | $120.00 | = | $17,100.00 |
| 1994: | 44.1 | hrs. | × | $121.73 | = | $ 5,368.29 |
| 1995: | 30.75 | hrs. | × | $124.88 | = | $ 3,840.66 |
| Total: | | | | | = | $51,920.51 |

**[10]** The rates employed by Magistrate Judge Kay reflect the $75 statutory base rate, adjusted upward for a cost-of-living increase. R & R at 29. In his Objections to the Report and Recommendation, Kooritzky also argues that he is entitled to an additional "special factor" adjustment to the statutory fee rate based on his expertise in immigration law. However, our Court of Appeals has determined that such special factor enhancements are

available only for lawyers whose specialty "requir[es] technical training or other education outside the field of American law." *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 598 (D.C.Cir. 1996), *citing Waterman Steamship Corp. v. Maritime Subsidy Bd.*, 901 F.2d 1119, 1124 (D.C.Cir. 1990). In *Vollmer*, the Court of Appeals noted that attorneys practicing administrative law in a specific regulated field normally acquire expertise in that field through experience, rather than through specialized training. Observing that "[i]f expertise acquired through practice justified higher reimbursement rates, then all lawyers practicing administrative law in technical fields would be entitled to fee enhancements," the *Vollmer* court held that such a result was not supported by the legislative history of the Equal Access to Justice Act. 102 F.3d at 598. Applied to the instant case, *Vollmer* confirms that plaintiff is not entitled to a "special factor" enhancement, particularly in view of the fact—as noted by Magistrate Judge Kay—that plaintiff prevailed in the Court of Appeals on a routine issue of administrative law. R & R at 32.

## IV.

### A.

**[11]** Because he believed them to be ineligible for fees, Magistrate Judge Kay had no occasion in his Report & Recommendation to review the reasonableness of the requested fees for co-counsel Teras, Champagne, Von Neumann and Purcell. However, the record, including the transcripts of the evidentiary hearings held before Judge Kay, provides an adequate basis for the Court to make this determination.

Plaintiff has requested compensation for 517.1 hours spent on his case by Christopher Teras. R & R at 33. The record contains conflicting information about the reasonableness of this request. In contrast to Kooritzky, there is no evidence that significant portions of time spent by Teras can be attributed to inexperience with the court system. Judging by his appearances before this Court, Teras provided able assistance to the plaintiff. Also weighing in Teras's favor is his testimony that he voluntarily "pared down" the hours

for which he ultimately claimed reimbursement. *Id.* at 52-53. However, the evidentiary hearings revealed that Teras failed to keep contemporaneous records for most of the hours claimed, which resulted in unreliable, and sometimes implausible (e.g. billing over 24 hours in one day), retrospective estimates of how much time he spent on plaintiff's case. *See* January 24, 1997 Hrg. Tr. at 65-79. Moreover, the lack of precision in the billing records, coupled with the number of hours billed by Kooritzky for similar tasks raise a concern about duplicative billing.

For these reasons, the hours billed by Teras exceed that which is reasonable, and must be reduced. *See Copeland v. Marshall*, 641 F.2d 880, 891 (D.C.Cir. 1980) (en banc) ("Hours that are not properly billed to one's client are also not properly billed to one's adversary pursuant to statutory authority.") A court's calculation of "reasonable" hours is, by nature, imprecise. With respect to Kooritzky's hours, the Report & Recommendation employed an item-by-item analysis, a method which provided invaluable information to this Court, and at the same time, far surpassed the degree of precision normally achieved in most attorneys' fees cases. For this Court to undertake a similarly detailed analysis of the hours billed by Teras would be an inefficient use of judicial resources. *Cf. Copeland v. Marshall*, 641 F.2d at 903 ("It is neither practical nor desirable to expect the trial court judge to have reviewed each paper in this massive case file to decide, for example, whether a particular motion could have been done in 9.6 hours instead of 14.3 hours."). Instead, given the close working relationship between Kooritzky and Teras during this case, and the equally poor recordkeeping by each, Magistrate Judge Kay's analysis serves as a useful benchmark for determining the amount of hours for which Teras is reasonable entitled to be compensated. The detailed scrutiny of Kooritzky's time undertaken in the Report & Recommendation and in this Memorandum resulted in reimbursement for approximately 42% of the hours originally billed by Kooritzky himself. Compared with Kooritzky, Teras employed a more credible—albeit imperfect—method of retrospectively estimating his time than did Kooritzky, *see* Jan. 24, 1997 Hrg. Tr. at 53-64, and the hours claimed in the individual billing entries are

more reasonable in relationship to the work performed. Balancing all of foregoing considerations in light of the success ultimately achieved by the plaintiff, it is the judgment of the Court that the number of hours billed by Teras should be reduced by 40%. Employing the annual statutory rates as determined by Judge Kay, plaintiff is entitled to the following compensation for work performed by Teras:

| | Hours Claimed | | Hours Granted | × | Adjusted Statutory Rate | | |
|---|---|---|---|---|---|---|---|
| 1991: | 109.5 | × 60% = | 65.7 | × | $113.48 | = | $ 7,455.64 |
| 1992: | 115 | × 60% = | 69.0 | × | $116.33 | = | $ 8,026.78 |
| 1993: | 161.5 | × 60% = | 96.9 | × | $120.00 | = | $11,628.00 |
| 1994: | 40.5 | × 60% = | 24.3 | × | $121.73 | = | $ 2,958.04 |
| 1995: | 90.6 | × 60% = | 54.4 | × | $124.88 | = | $ 6,793.47 |
| Total: | | | | | | = | $36,861.93 |

**B.**

**[12]** Plaintiff also claims compensation for 25 hours of work performed by Margot Champagne and 40 hours of work performed by Ronald VonNeumann. However, it appears that the sole documentation of the work performed by these attorneys is in the form of general affidavits, in which Champagne states that she "rendered approximately 25 professional hours of legal services" on behalf of plaintiff, and in which legal assistant Thomas Moore declares that he has "personal knowledge that Mr. VonNeumann rendered approximately 40 professional hours of legal services in the above captioned matter." *See* Plaintiff's Supplemental Summary of Attorney's Fees and Expenses (July 6, 1995) at Exhibits G and D. While there is no reason to doubt the veracity of these statements, they are insufficient to enable the Court to determine what work was performed, whether the expenditure of hours was reasonable, and whether the work was duplicative of that performed by other attorneys. Accordingly, plaintiff's request for fees for work performed by Champagne and VonNeumann is denied.

[13] By contrast, plaintiff has provided a detailed account of hours expended by Sean Purcell. *See* Plaintiff's Supplemental Petition for Attorney's Fees and Expenses (Dec. 13, 1995) at Exh. A. Unlike Kooritzky and Teras, Purcell testified that he kept detailed and contemporaneous records of his time as it was expended, Feb. 19, 1997 Hrg. Tr. at 49, and those expenditures of time appear to be reasonable. Plaintiff is thus entitled to compensation for the entire 86.7 hours claimed for work performed by Purcell in 1995, at the inflation-adjusted statutory rate of $124.88 per hour, for a total of $10,827.10.

V.

Finally, plaintiff claims compensation for 1,533.3 hours expended by legal assistant Thomas Moore. The reasonableness of this claim requires further scrutiny by the Court. However, there also remains a question which requires further briefing by the parties: namely, the "prevailing market rate" for Moore's services is based on a rate of $75 per hour, which is the rate at which Teras purportedly bills clients for work performed by legal assistants. R & R at 36. However, Moore is not in the same situation as legal assistants at Teras's firm, whose billing rates presumably reflect other costs of the firm in maintaining them as full-time employees. Plaintiff's request characterizes Moore as an "independent contractor," a term which seems accurate in light of the fact that he is not an employee of either Kooritzky or Teras. R & R at 37-38. It is difficult to imagine that a paralegal working on an independent contract basis—particularly someone with no prior litigation experience—could collect $75 per hour from the law firms for whom he or she works. The record contains no evidence that Moore has actually received such a fee from any client. A subsequent Memorandum will determine both the hours and the rate at which plaintiff will be compensated for Moore's services.

VI.

[14] The Report & Recommendation noted that plaintiff has submitted two separate claims for "other expenses" as part of his fee request. Magistrate Judge Kay correctly concluded that the first

claim for $410.00 is not recoverable, because plaintiff has failed to indicate the basis for the charge. R & R at 41. Plaintiff filed no objection to this conclusion. The second claim consists of a bill for $295.42 from the law firm of Jaeger and Teras. As stated above, expenses incurred by Teras are potentially compensable. However, charges for taxi fares and postage are not covered by the Act. *Action on Smoking and Health v. Civil Aernoautics Bd.* 724 F.2d 211, 223 (D.C.Cir. 1984). Because postage is disallowed, it follows that charges for other forms of document delivery, including the use of facsimile machines, should also be disallowed. Of the $295.42 claimed, plaintiff is entitled only to $134.70, which represents the total of the photocopying charges claimed. *Id.*

A final order implementing the decisions explained herein will be issued upon determination of the compensation to which plaintiff is entitled for services rendered by Mr. Moore.

**Samuel G. KOORITZKY, Plaintiff,**

**v.**

**Alexis M. HERMAN, Secretary of Labor, Defendant.**

**Civil Action No. 91-3011-LFO.**

United States District Court,
District of Columbia.

May 7, 1998.

Immigration lawyer who had brought successful action challenging regulation adopted by Secretary of Labor, and who sought attorney fee award under Equal Access to Justice Act (EAJA), moved for reconsideration of memorandum and order, 6 F.Supp.2d 1, resolving majority of attorney fee issues. The District Court, Oberdorfer, J., held that reasonable fee for services provided to lawyer, who had proceeded pro se, by paralegal retained as independent contractor was $35 per hour.

Motion for reconsideration granted in part and denied in part, and petition for attorney fees and expenses granted in part and denied in part.

**1. Federal Civil Procedure — 2737.4**

To extent that paralegal who had performed services for law firm had been described as "independent contractor," appropriate rate of compensation for paralegal's services, for purposes of attorney fee award, was amount which would have paid to paralegal as independent contractor, not what law firm would have charged clients for paralegal services performed by its employees.

**2. United States — 147(4)**

Reasonable fee for services provided to attorney by paralegal hired as independent contractor, for purposes of attorney fee award under Equal Access to Justice Act (EAJA), was $35 per hour; rate reflected middle of range of prevailing market rates in community in question of $20-$50, and was proper for paralegal's particular level of skill and experience and roughly coincided with paralegal's constructive admission that agreed-upon hourly fee was $37. 28 U.S.C.A. § 2412.

**3. Federal Civil Procedure — 2737.4**

Fee applicant's burden in establishing reasonable hourly rate entails showing of at least three elements: billing practices, prevailing market rates in relevant community, and skill, experience, and reputation.

**4. Federal Civil Procedure — 2737.4**

Contingent fee premiums are generally not compensable in context of attorney fee litigation.

**5. United States — 147(4)**

Time spent on clerical tasks, including filing of documents with court, does not constitute compensable legal work, and therefore is not compensable under Equal Access to Justice Act (EAJA). 28 U.S.C.A. § 2412.

**6. Federal Civil Procedure — 2742.5**

Attorney fee request must be supported with detailed information, based on contemporaneous, completed, and standardized time records which accurately reflect work done by each attorney.

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Christopher A. Teras, Jaeger & Teras, Washington, DC, for Plaintiff.

Samuel Kooritzky, Kooritzky & Associates, Arlington, VA, Pro se.

Michael Joseph Ryan, U.S. Attorney's Office, Washington, DC, for Defendant.

*MEMORANDUM*

OBERDORFER, District Judge.

A Memorandum and Order of December 17, 1997 resolved the majority of issues in plaintiff's long-pending fee application, and invited the parties to provide further information pertaining to the single outstanding issue—compensation for services provided by paralegal James Moore. Defendant filed a Response on January 14,

1998, and plaintiff filed a supplemental Submission on February 4, 1998. On February 16, 1998, plaintiff filed a "Motion for Reconsideration of Certain Limited Aspects of the Court's Orders of December 17, 1997 and January 30, 1998." Defendant opposed this motion on February 27, 1998. For reasons started herein, plaintiff is entitled to $25,441.50 for services rendered by James Moore. Plaintiff's motion for reconsideration is denied, except that plaintiff will be compensated for an additional 35 hours of work performed in 1992.

## I.

### A.

Plaintiff moves for reconsideration of four previously decided issues. First, plaintiff argues that, contrary to the Order of January 30, 1998, he should now be permitted to supplement his fee request with claims for hours worked in the years 1995 and 1996, i.e. two to three years ago. Plaintiff faults the Court for not previously specifying a deadline for filing any supplemental petitions. However, the Court had no reason to establish such a deadline, where plaintiff gave no indication—in over eighteen filings, two motions hearings, and seven days of evidentiary hearings that have occurred since he last supplemented his fee request on December 13, 1995—that he intended to file any further supplements. While plaintiff argues that there is no firm "rule" that specifies when a supplement to a fee request is to be submitted, the fee petition process is certainly governed by a rule of reasonableness. For reasons stated in the January 30, 1998 Memorandum and in Defendant's Opposition to the motion for reconsideration, plaintiff's request will be denied.

Second, plaintiff requests that he be allowed to petition for fees based on the time expended in conjunction with the evidentiary hearings before Magistrate Judge Kay in 1997. For reasons stated in the January 30, 1998 Memorandum, that request will also be denied.

Third, plaintiff states that the December 17, 1997 Memorandum incorrectly denied plaintiff's request for attorney hours expended

on the defendant's motion for summary affirmance. Defendant concurs that, in fact, plaintiff prevailed on the motion for summary affirmance. *See* Defendant's Oppos. at 4. Accordingly, the hours granted in the December 17, 1997 Memorandum are amended as follows:

> *9/21/92-9/22/92.* Granted: 5 hours. To the extent that this task included both reading defendant's motion for summary affirmance, and researching ("understanding") the standards for granting such a motion, five hours could reasonably have been expended on this activity.
>
> *9/22/92-9/27/92, 9/29/92-10/5/92.* Granted: 30 hours. In light of the fact that plaintiff had lost on summary judgment in the District Court, and that the summary affirmance motion could be dispositive of his claim in the Court of Appeals, thirty hours is a reasonable period of time for plaintiff to have expended on drafting his opposition.

In sum, plaintiff will be compensated for an additional 35 hours of work performed in 1992.

Finally, plaintiff requests reconsideration of the fees granted for work performed by attorney Christopher Teras. Plaintiff's counsel states that he "can find no evidence that he [Teras] recorded more than 24 attorney hours for a day as suggested" in the December 17 Memorandum. Plaintiff's attention is directed to pages 71 through 72 of the transcript of the January 24, 1997 hearing, and to the underlying documents discussed therein. More importantly, plaintiff's attention is again directed to pages 65 through 79 of the same transcript, which suggest that the hours claimed by Teras were based on speculative, retrospective estimates. Plaintiff also suggests that it is inconsistent to reduce the hours billed by Teras in 1995, the year in which he began to keep contemporaneous time records, but grant 100% of the hours billed by attorney Sean Purcell in the same year. Purcell did not become involved in plaintiff's case until June of 1995. *See* Feb. 19, 1997 Tr. at 36. The work he performed was straightforward legal work pertaining to plaintiff's attorneys' fee petition. *Id.* at 40. By contrast, a certain percentage

of the work performed by Teras on plaintiff's fee petition in 1995 must be attributed to the need to calculate, recalculate, and explain his own hours as claimed in the fee petition, a task which would have been unnecessary but for his failure to keep accurate records of his time prior to 1995. In this sense, Teras is similarly situated not to Purcell, but to plaintiff Kooritzky. *See* December 17, 1997 Memorandum at 15. Moreover, as stated in the December 17 Memorandum, the reduction in hours claimed by Teras also reflects a concern about duplicative billing (i.e. for work identical to that performed by Kooritzky) that does not apply to Purcell, who seems to have been assigned discrete tasks. *See* December 17, 1997 Memorandum at 20; Feb. 19, 1997 Tr. at 41 (in which Purcell testifies that he only spoke with Kooritzky "a couple of times" while doing his work). Plaintiff's request for reconsideration of hours attributed to Teras will be denied.

In sum, plaintiff's motion for reconsideration will be denied, except with respect to the calculation of attorney hours worked by plaintiff. After the 35-hour adjustment explained above, plaintiff is entitled to the following fees for his own work:

| | | | | | | |
|---|---|---|---|---|---|---|
| 1991: | 136 | hrs. | × | $113.48 | = | $15,433.28 |
| 1992: | 122.5 | hrs. | × | $116.33 | = | $14,250.43 |
| 1993: | 142.5 | hrs. | × | $120.00 | = | $17,100.00 |
| 1994: | 44.1 | hrs. | × | $121.73 | = | $ 5,368.29 |
| 1995: | 30.75 | hrs. | × | $124.88 | = | $ 3,840.66 |
| Total | | | | | = | $55,992.06 |

**B.**

Although the Court requested briefing on the limited issue of prevailing paralegal wages, both defendant and plaintiff have attempted in their briefs to reopen issues previously addressed by the Memorandum and Order of December 17, 1997, and a subsequent Memorandum & Order of January 30, 1998. These arguments can be dispensed with quickly.

Defendant continues to insist that plaintiff is not entitled to any compensation for hours worked by Moore. This issue was addressed and resolved by the Court in pages 6 through 10 of the

December 17 Memorandum. To buttress her argument, defendant now points to a rule of the Virginia Supreme Court pertaining to court appearances by third-year law students. This rule is entirely irrelevant to the present situation, where Moore made no court appearances on behalf of the plaintiff. The record contains no indication that Moore held himself out to plaintiff as a practicing attorney; on the contrary, plaintiff's claim (and indeed, defendant's claim in her March 5, 1997 submission) is that Moore provided paralegal services. *See also* Feb. 6, 1997 Tr. at 83. The Court is not aware of any law in either Virginia or the District of Columbia which prohibits law students from working as paralegals, and accepting compensation for such work.[1]

**[1]** For his part, the plaintiff again asserts that $75.00 per hour, the rate at which the law firm of Teras & Jaeger bills paralegal services to their clients, is the appropriate rate at which he should be reimbursed for Moore's work. Plaintiff states that both he and Teras incurred "substantial overhead expenses for the current case in support of Mr. Moore's efforts," but provides no indication of what those expenses were, or possibly could possibly be. *See also* Feb. 6, 1997 Tr. at 36, 90 (testimony that Moore provided his own computer and printer at Kooritzky's office, and that he spent little time at Teras's office). As stated in the December 17 Memorandum, to the extent that plaintiff has repeatedly characterized Moore as an "independent contractor," the appropriate rate of compensation is that which plaintiff would have paid to Moore as an independent contractor, not what the Teras firm would charge clients for paralegal services performed by its employees.

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1. In his Report & Recommendation, Magistrate Judge Kay refers to rules that permit students like Moore to "read" for the Virginia bar without attending law school, as authorized by Va. Stat. § 54.1-3926 (1997). According to testimony at the evidentiary hearings, students in this program are prohibited from accepting compensation for the 18.5 hours per week that they are required to study in the office of an attorney. R & R at 2. However, as stated on page 2 of the Report & Recommendation, and reiterated on page 9 of the December 17, 1997 Memorandum, Moore agreed to work on plaintiff's lawsuit during his remaining time.

Lasdy, plaintiff now, for the first time, submits time records for work performed by attorney Margot Champagne from the years 1991 through 1995. The December 17, 1997 Memorandum denied plaintiff's request for fees for work performed by Champagne on grounds that plaintiff's fee petition contained only an affidavit by Champagne, but no detailed records of Champagne's time. Plaintiff now offers documentation that Champagne mailed her time records to the plaintiff on October 23, 1995 via express mail but states that "the mail was never located. As a result, Ms. Champagne's time records were not submitted to the court. The Plaintiff was without knowledge that Ms. Champagne's time records had not been submitted . . . until December 1997 [when] Ms. Champagne saw the Court's order . . . ." Pltf.'s Submission at II.D. The time records now submitted on behalf of Champagne indicate that plaintiff himself requested Champagne to forward her time records during the week of October 16, 1995; if plaintiff "was without knowledge" that he failed to include those records in the supplemental submission he filed with the court eight weeks later, this lack of knowledge can only be attributed to his own negligence. Moreover, plaintiff had ample time and opportunity to discover this omission in the thirteen months that passed between his December 13, 1995 filing and the January, 1997 hearings before Magistrate Judge Kay. Although the omission of Champagne's hours is unfortunate, for reasons of judicial economy, and in fairness to the defendant, the Court cannot continually revisit its earlier rulings on the petition every time plaintiff discovers a previously omitted document. Adjudication of plaintiff's fee petition was initially delayed for over a year due to errors and omissions in the documents submitted by plaintiff to the Court. For the foregoing reasons, plaintiff's request to supplement his petition with time records of attorney Champagne is denied.

## II.

### A.

The December 17 Memorandum found that plaintiff was eligible to be compensated for work performed by legal assistant Thomas Moore, but not at the $75 per hour rate requested in his fee petition.

*See* December 17, 1997 Memorandum at 22-23. Accordingly, an accompanying Order invited the parties to submit "in affidavit or documentary form, evidence relevant to the 'prevailing market rate' at which legal assistants working as independent contractors in the Washington, D.C. area are compensated."

1. *Plaintiff's Evidence.* Plaintiff's February 4, 1997 submission contains an affidavit by Moore, which indicates that Moore came to the Kooritzky's "team" with 30 years of service in the Department of Transportation. He had retired as Chief of the Tariff Division of the Department as a GS-15. Over those years he claims to have become "proficient and knowledgeable with the APA." Moore Affidavit at 1. He states that he was "in charge and oversaw the work of others in issuing and finalizing rules under the APA." In support of this assertion, Moore lists several rules and Notices of Proposed Rulemaking pursuant to the APA for which he had major responsibility. He attaches to his affidavit his superior's "special" recognition for "planning and drafting a proposed rule with respect to an electronic tariff filing and simplified tariff policy," the "product of hard and highly professional staff work." *Id.* Ex. 3. Jonathan B. Hill, a partner in a major Washington law firm who had known Moore's work in the government and, "impressed with his knowledge and understanding of the Administrative Procedures Act and related matters . . . retained his services to 'review and prepare a report on the Notice of Proposed Rulemaking issued by the Department of Transportation.' " Hill and his client found the report "to be thorough and professional and substantially accurate." Moore Affidavit, Ex. 4, Affidavit of Jonathan B. Hill. Moore's curriculum vitae features his government experience with APA rulemaking. As indicated in the December 17, 1997 memorandum, since Moore's retirement he has "read law" in preparation for the Virginia bar exam and in 1996 sat for it; there is no indication of the result.

Plaintiff proffers two types of evidence about the market rates of fees payable to independent contractor paralegals, as distinguished from the $75 per hour charged by the Teras firm. First, Moore's affidavit states that he recently surveyed eight area firms which

specialize in providing paralegals or consultants on a contract basis to assist with APA litigation. Moore Affidavit at 2. According to Moore, the "market rates quoted ranged between twenty ($20.00) and thirty-five ($35.00) dollars per hour depending on experience." *Id.* Moore also surveyed three Washington, D.C. law firms, which were "willing to pay between forty-five ($45.00) and fifty-five ($55.00) dollars per hour for a paralegal/legal assistant or consultant with a substantial knowledge of the APA and some knowledge of litigating APA cases." *Id.* All firms surveyed by Moore stated that any work in excess of forty hours per week would be compensated at one and one-half times the quoted rate, and that work performed on Sundays or legal holidays would be compensated at twice the quoted rate. Moore Affidavit at 3. Moore does not indicate whether the quoted rates reflect the amount of money actually paid to independent paralegals, as requested in the Order, or whether these rates reflect the amounts paid to contracting agencies to procure the services of such independent paralegals. *See* December 17 Memorandum at 23.

Second, the Jonathan Hill affidavit states that Moore was paid by his firm "to review and prepare a report on a Notice of Proposed Rulemaking issued by the Department of Transportation" at a rate of $50 per hour. Hill Affidavit at 1-2.

In addition to these objective items of evidence about a market rate for paralegals generally, plaintiff and Moore have offered several somewhat inconsistent versions of their original understanding about Moore's compensation. Most recently, Moore's affidavit dated February 4, 1998, represents that Moore would be "willing to help [Kooritzky] under the auspices of Mr. Teras" with the expectation that he would receive "the same hourly rate that [he] had been receiving in [his] former position, i.e. $37 per hour." In response, according to Moore, Kooritzky explained that he "could not afford to pay currently any fee" but stated that "if we prevail and the rule is overturned by the court he would be able to afford to arrange with Mr. Teras . . . to compensate [him] at the rate of $37 *plus* a premium of $13 per hour for a total of $50 per hour." Moore Affidavit at 3-4.

On earlier occasions, Kooritzky, Teras and Moore have testified variously that:

1. There was no understanding as to the amount of Moore's compensation (transcript of Jan. 24, 1997 at 104);

2. It would be the "going rate" for paralegals, possibly $60.00/hour (*Id.* at 67); and

3. Moore and Teras reached a "contingency agreement . . . [that] Moore would be compensated at the rate of $75/hour if the rule was overturned and fees were recovered." (Kooritzky Affidavit, April 16, 1996 Reply to Def.'s Oppos., Ex. B at 3).

2. *Defendant's Evidence.* The defendant submits the current Register of Wage Determinations Under the Service Contract Act for the Washington, D.C. area, issued on July 14, 1997 ("Wage Determination"). *See* Def.'s Response at Ex. B. These rates reflect the current hourly rates paid by the United States government to paralegals hired from outside contractors. Def.'s Response at 3. The Wage Determination includes four types of paralegal positions, numbered I-IV, whose hourly wages range from $13.22 to $24.95. The Wage Determination states that the job titles and corresponding duties are drawn from the "Service Contract Act Directory of Occupations," as amended. Judicial notice is taken of the current Directory of Occupations job descriptions for each of the four categories of paralegals. *See* Appendix A (attached).

**[2-4]** 3. *Rate of Compensation.* "[A] fee applicant's burden in establishing a reasonable hourly rate entails a showing of at least three elements: . . . billing practices; . . . skill, experience, and reputation; and the prevailing market rates in the relevant community." *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C.Cir. 1995).

(a) *Billing practices.* The best evidence of a reasonable hourly rate—a customary billing rate—is unavailable in this case, where Moore appears to have had, at one time or another,[2] only one

2. While the Hill affidavit indicates that Moore has received $50 per hour for his services as an independent contractor, it does not specify at what point in time

paralegal engagement in addition to his work on plaintiff's case. Moreover, the work performed by Moore for attorney Hill—reviewing a Notice of Proposed Rulemaking issued by Moore's former employer, the Department of Transportation—is somewhat different than the basic legal research and manual litigation support tasks that Moore performed for plaintiff.

Tangentially relevant to the "billing practices" inquiry is the fact that, according to Moore's latest version, his fee agreement with plaintiff contemplated "a rate of $37 *plus* a premium of $13 for a total of $50." Moore Affidavit at 304 (emphasis in original). It is reasonable to infer from plaintiff's own description of a "contingency agreement" with Moore (Kooritzky Affidavit, April 16, 1996), and the total circumstances that the $37 was to be the rate for services and that the $13 premium was intended by plaintiff as compensation for the contingent nature of his obligation. However, it is the law of this Circuit that such contingency premiums are generally not compensable in the context of attorney's fee litigation. *See King v. Palmer*, 950 F.2d 771 (D.C.Cir. 1991). It is a reasonable inference from the direct evidence that Moore's latest affidavit is an admission, after reflection, that he perceived the value of his services to be $37 per hour.

(b) *Skill, experience and reputation.* The record does not indicate that Moore has had enough experience as an independent contractor paralegal to acquire a "reputation" within the private sector. However, his limited paralegal experience, if any, prior to his work for plaintiff is balanced by his extensive experience with agency rulemaking under the APA and its notice requirements in particular, the controlling issue of plaintiff's case. Thus, no special adjustment to Moore's hourly rate—either upward or downward—is warranted on these grounds on account of his APA skills, experience and reputation. *See Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C.Cir. 1995).

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Moore was able to command such a rate, i.e., before his work for plaintiff, concurrently with it, or sometime after that engagement had terminated.

(c) *Prevailing market rate.* Assessing the "prevailing market rate" for Moore's services is difficult, where the market at issue—that for independent contractor paralegals—is ill-defined and unfamiliar, in the sense that it is not the market typically at issue in attorney's fee petitions before this Court or our Court of Appeals. However, the difficulties associated with determining a market rate cannot excuse a court from making such a calculation to the best of its ability. *See Save Our Cumberland Mtns. v. Hodel,* 857 F.2d 1516, 1525 (D.C.Cir. 1988) ("the difficulty of application of the method Congress intended does not justify our abandoning it").

The December 17 Memorandum invited the parties to present their best evidence as to the "prevailing market rates" for independent contractor paralegals. The evidence offered by both parties establishes that, in fact, the hourly wages commanded by independent paralegals working as independent contractors vary widely depending on the nature of the work, the experience of the paralegal, and the means of the contracting employer. The ultimate task here is to extrapolate from the direct evidence a finding as to where the rate for Moore's services falls within that range.

The evidence offered by the government represents the rates at which Moore would be paid were he working for the government. However, Moore was working in the private sector, and is entitled to be compensated at a private sector market rate. Given the downward pressure on government expenditures, the government rates are not a substitute for private sector market rates; however, they can be taken as a reliable measure of the bottom of the market range for Moore's services. A review of the Wage Determination offered by the United States, in conjunction with the Directory of Occupations, indicates that the description for "Paralegal/Legal Assistant III" most closely approximates Moore's work for plaintiff. According the Directory, a "Paralegal/Legal Assistant III" "participates in the substantive development of cases"; the duties include "review[ing] and analyz[ing] available precedents relevant to cases under consideration for use in presenting case summaries to trial attorneys." *See* Appendix A. This description fits the bulk

of the time recorded after the fact by Moore as having been devoted to legal research. *See* March 1, 1995 Affirmation, Attachment I at 1. According to the Wage Determination, the hourly rate for this position in Washington, D.C. and Virginia is $20.62. Def.'s Response at Ex. B. Thus, $20.62 will be taken as the floor of the market range for Moore's services. This figure corresponds with the floor of the range ($20-$35 per hour) at which the private contracting firms surveyed by Moore compensate their paralegals, as reported in his affidavit.

While the Hill affidavit does not establish Moore's customary billing rate for purposes of plaintiff's fee petition, it can be viewed as evidence of the highest rate Moore could command in the private sector as an independent contractor. The work performed for Hill falls in the area of Moore's greatest expertise and experience: rulemaking at the Department of Transportation, where he had worked for 30 years. Moreover, prominent, established law firms like Hill's are the employers most likely to pay the highest rates to contractor employees. Thus, $50.00 will be taken as the ceiling for the value of Moore's services within the private sector market.

For reasons stated above, the "prevailing market rate" for Moore's services to plaintiff appears to lie somewhere between $20.62 and $50.00 per hour. Both the pay scale offered by the government and the firms surveyed by Moore suggest that the most important factor in determining the wage of any individual paralegal within this range is experience. In this case, at the time Moore undertook his work for plaintiff, he had no previous experience as a paralegal, and thus, none of the litigation support skills—e.g., organizing large numbers of documents, cite-checking, knowledge of court procedures—which command a premium. At the same time, Moore's extensive prior experience in government is not only an indicator of reliability and competence, but gave him familiarity with the Administrative Procedure Act which was undoubtedly useful in his work for plaintiff in this particular case. Balancing these factors, Moore qualifies neither for the market rate applicable to government employees nor the rate paid by private practitioners for the most experienced of paralegals, but directly in the middle of those two extremes. Thus, the Court's application of

the method Congress intended for determining the prevailing market rate by extrapolation from the direct evidence yields a finding that Moore should be compensated at the rate of $35.00 per hour, i.e. the middle of the range between $20.62 and $50.00. *See Save Our Cumberland Mtns. v. Hodel*, 857 F.2d at 1516.

Considering the above factors in determining a reasonable hourly rate for Moore, *see Covington v. District of Columbia*, 57 F.3d at 1107, the evidence supporting the prevailing market rate is most substantial and persuasive. Moreover, this rate inherently reflects Moore's particular level of skill and experience, and roughly coincides with Moore's constructive admission of the fee that was agreed to between plaintiff and himself, i.e. $37.00 per hour. For these reasons, the reasonable hourly rate at which Moore is entitled to be compensated is the prevailing market rate: $35.00 per hour.

**B.**

Having determined the hourly rate for Moore's services the next question is to determine the number of hours expended by Moore for which plaintiff is reasonably entitled to compensation. Moore's work is summarized in plaintiff's July 6, 1995 "Supplemental Summary of Attorney's Fees and Expenses," and plaintiff's December 13, 1995 "Supplemental Petition for Attorney's Fees and Expenses." The total number of hours claimed by Moore for the years 1991 through 1994 is 1533.2. Dec. 13, 1995 Supp. Petition at 6. Adjusted for several small errors of addition and subtraction,[3] the correct total claim is for 1517.7 hours.

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3. Comparing the time sheets submitted by Moore with the total hours claimed for Moore in Plaintiff's December 12, 1995 Supplemental Petition, Moore appears to have overstated his total hours for 1991 by 10 (*see* July 6, 1995 Supplemental Summary, Ex. F, Statement at 4); overstated his total hours for 1994 by 8.6 (compare July 6, 1995, Supplemental Summary, Ex. F, Statement at 14) (total hours for 1991-1993). *Id.* at 15-16 (time sheets for 1994); Dec. 12, 1995 Supplemental Petition at 6 (total hours for 1991-1994); and understated his hours for 1995 by 3 (compare Dec. 12, 1995 Supplemental Petition at 6. *Id.* at Ex. D).

[5] As indicated in the December 17, 1997 Memorandum, time spent on clerical tasks, including the filing of documents with the Court, does not constitute compensable legal work, and therefore is not compensable under the Equal Access to Justice Act. *See* Dec. 17, 1997 Memorandum at 10. Thus, at the outset, time spent by Moore physically filling motions will be excluded from plaintiff's petition:

| | |
|---|---|
| 11/27/91 | 3 hours |
| 12/13/91 | 3 hours |
| 1/6/92 | 3 hours |
| 1/14/91 | 6 hours |
| 1/30/91 | 10 hours |
| 6/19/92 | 6 hours |
| 7/24/92 | 3 hours |
| 9/1/92 | 3 hours |
| 10/5/92 | 9 hours |
| 9/14/93 | 3 hours |
| 3/1/95 | 3 hours |
| 5/8/95 | 3 hours |
| 6/30/95 | 5 hours |
| 7/6/95 | 1 hour |
| 10/19/95 | 1 hour |
| 11/24/95 | 1 hour |

**Total Reduction for Filing: 63 hours**

Thus, the revised total claimed by Moore (1517.7 hours minus 63 hours) is *1454.7 hours.*

**C.**

The hours claimed for Moore's services exceed the number of hours claimed for any other attorney on this case, including plaintiff himself. As such, Moore's time records were a significant focus of the evidentiary hearings before Magistrate Judge Kay, which included three days of testimony by Moore himself. In his Report & Recommendation, Magistrate Judge Kay concluded:

> The Court is constrained to observe that the cavalier manner Kooritzky kept time records was equally pervasive in his claim for hours worked by Moore. Despite the opportunity afforded Kooritzky during seven days of hearings, he failed to fully cure or explain the inaccuracies that pervade even his modified request for fees. For example, as pointed out during the hearings, the claim for Moore's fees contains a request for more hours worked during a three week period than there were actual hours in that period (Hr'g 1/16/97 at 69); a bill for 29 hours worked in a single day (Hr'g 1/16/97 at 67); a bill for 48 hours of work done on a pleading that had already been filed (Hr'g 1/21/97 at 47); a bill for 21 hours in a day working on a pleading before delivering that pleading at 2:24 p.m. on that day (Hr'g 1/21/97 at 48-50).

R & R at 38.

**[6]** In his recent affidavit, Moore disputes the "inference" in the Report & Recommendation that he was incapable of working 20-hour days, Moore Affidavit at 4, and offers documents that suggest that he had a history of working long hours while employed at the Department of Transportation. *Id.* at Ex. 4. Indeed, the testimony of Moore, Teras and Kooritzky at the evidentiary hearing consistently suggests that Moore did expend an extraordinary amount of time working on plaintiff's behalf. However, this fact alone is not sufficient to justify compensating plaintiff for all hours claimed for Moore. First, plaintiff must support his fee request with detailed information, based on "contemporaneous, completed and standardized time records which accurately reflect the work done by each attorney." *Nat'l Ass'n of Concerned Vets. v. Sec. of Defense*, 675 F.2d 1319, 1327 (D.C.Cir. 1982). On its face, as indicated by Judge Kay, the claim for Moore's fees falls short of this standard, thus requiring the fact-finder to discount some of the hours claimed due to insufficient documentation. Second, even if plaintiff's application were technically impeccable, and even if Moore is assumed to have worked all the hours claimed, plaintiff would not be automatically entitled to compensation for all hours

billed: the Court must still make a determination that those hours represent "time reasonably expended." *Id.*

As was the case with plaintiff's own hours, *see* Dec. 17, 1997 Memorandum at 12-13, the record indicates that a significant percentage of the hours billed by Moore must be attributed to the combined inexperience of Moore and plaintiff. For example, plaintiff's claim includes 108 hours billed by Moore in a 9-day period for "Review[ing] Court rules and ma[king] recommendations to attorney to bring Motion into conformance with Court Rules." *See* July 6, 1995 Supp. Summ. of Attorney's Fees and Expenses, Ex. F at 9.

In other instances, Moore's undisputed dedication to plaintiff's case appears itself to have resulted in excess hours. *See* Feb. 6, 1997 Tr. at 54 ("[O]nce I started working on that rule, I was just almost consumed by it . . . ."). The following colloquy between Moore and Magistrate Judge Kay is illustrative. Moore testified (and plaintiff's fee application reflects) that he spent numerous hours reviewing 109 comments filed in response to the Department of Labor rulemaking at issue in this litigation. Feb. 6, 1997 Tr. at 49. According to his testimony, Moore's review of the public comment files uncovered factual information that was useful to plaintiff at the trial court level and instrumental to plaintiff's success in the Court of Appeals. *Id.* at 51, 60-62. However it also served as a springboard for further legal research:

> THE COURT: You said you went down and reviewed comments—
>
> MOORE: Right. In other words, I would research the motion or the pleading, whatever [the defendant] filed—submitted to the Court, and then I would go down to George Mason [law library]. I would find the court cases that they were referring to support their position—
>
> THE COURT: In the comments.
>
> THE WITNESS: Right.

THE COURT: So in other words, you would double check all of the . . . research or the case citations in the comments that were filed by other parties?

THE WITNESS: Right.

THE COURT: Why did you do that?

THE WITNESS: Because I have known some of those to be wrong.

THE COURT: I see so you undertook to, in effect—

THE WITNESS: Tried to discredit it anyway we could.

THE COURT: You were going to discredit the comments?

THE WITNESS: Try to, yes.

THE COURT: So in effect, you researched all the cases that were cited in the comments that were filed both for and against the rule with the Department of Labor?

THE WITNESS: That's right. And then we'd go through Shepherd [sic], and Shepardize them is another thing.

*Id.* at 71-73. Similarly, Moore previously indicated that he located "each and every case" listed in the annotated version of 5 U.S.C. § 553, and "Shepardized" a certain number of these.[4] July 6, 1995 Summary of Supplemental Attorney's Fees, Ex. F. While such a thorough approach may be a useful exercise for a law student, it is an obviously inefficient way to conduct legal research on the Administrative Procedure Act and its interpretation within the District of Columbia Circuit, as Moore's supervising attorneys should have been aware. While Moore's diligence is commendable, the government cannot be expected to bear the costs of Moore's zeal beyond what was reasonably necessary to conduct plaintiff's case.

For these reasons, the hours billed by Moore exceed that which is reasonable, and must be reduced. As stated in the December 17 Memorandum:

4. The current version of West's United States Code Annotated contains 482 case annotations to 5 U.S.C. § 553.

> [a] court's calculation of "reasonable" hours is, by nature, imprecise. With respect to Kooritzky's hours, the Report & Recommendation employed an item-by-item analysis, a method which provided invaluable information to this Court, and at the same time, far surpassed the degree of precision normally achieved in most attorneys' fees cases. For this Court to undertake a similarly detailed analysis . . . would be an inefficient use of judicial resources. *Cf. Copeland v. Marshall*, 641 F.2d at 903 ("It is neither practical nor desirable to expect the trial court judge to have reviewed each paper in this massive case file to decide, for example, whether a particular motion could have been done in 9.6 hours instead of 14.3 hours.") . . . Magistrate Judge Kay's analysis serves as a useful benchmark . . . .

Dec. 17, 1997 Memorandum at 20. As indicated above, Magistrate Judge Kay found Moore's method of timekeeping to be similar to plaintiff Kooritzky's, and Moore's time entries, like Kooritzky's, often exceed the amount of time reasonably necessary to accomplish a given task. These findings and considerations lead to a conclusion that Moore's hours for the period 1991 through 1995 should be reduced by the same percentage by which plaintiff's own hours were ultimately reduced: 54%.[5] The hours claimed for 1997 and 1998, as explained *infra* in Section III., will be reimbursed in full. Accordingly, plaintiff is entitled to reimbursement for Moore's services as follows:

| | Hours Claimed | | | Hours Granted | × | Rate | | |
|---|---|---|---|---|---|---|---|---|
| 1991: | 374 | × | 46% = | 172.0 | × | $35.00 | = | $ 6,020.00 |
| 1992: | 595 | × | 46% = | 273.7 | × | $35.00 | = | $ 9,579.50 |
| 1993: | 394 | × | 46% = | 181.2 | × | $35.00 | = | $ 6,342.00 |
| 1994: | 44.5 | × | 46% = | 20.5 | × | $35.00 | = | $ 717.50 |
| 1995: | 110.2 | × | 46% = | 50.7 | × | $35.00 | = | $ 1,774.50 |
| 1997: | 9.3 | × | 100% = | 9.3 | × | $35.00 | = | $ 325.50 |
| 1998: | 19.5 | × | 100% = | 19.5 | × | $35.00 | = | $ 682.50 |
| Total: | | | | 726.9 | × | $35.00 | = | $25,441.50 |

5. As a result of the adjustment explained *supra*, plaintiff Kooritzky is being reimbursed for 475.85 of the total 1043.5 hours claimed, i.e. 46%.

## III.

In accordance with the Memorandum and Order of January 30, 1998, plaintiff has supplemented his fee petition with claims for 1997 and 1998, for legal work required to respond to Magistrate Judge Kay's Report & Recommendation, and to this Court's Order of December 17, 1998. *See* Pltf.'s Submission at II.A. According to plaintiff, these requests are based on contemporary time records. *Id.* The records are well organized and detailed, and defendant has offered no objections. The time billed by various personnel appears reasonable for the tasks described, with two minor exceptions:

1. On December 11, 1997, attorney Tae Kim, who has previously billed no time to this case, billed 3 hours to "Analyze status of fee application; Draft praecipe." For anyone previously involved with this fee application, its "status" needed no analysis: the magistrate judge's report and recommendation, as well as the parties' objections thereto, were pending before the Court. The "Praecipe" filed on or about that date consisted of a three-sentence request to the Court for a hearing on the fee petition. These activities should have required no more than 30 minutes.
2. On February 3, 1998, attorney Christopher Teras billed 6 hours to "Revise Moore Affidavits; organize exhibits; complete outline for draft of submission; organize records and documents for all persons claiming time." The organization of exhibits, records and documents is a clerical task for which attorneys will not be compensated. *See Missouri v. Jenkins*, 491 U.S. 274, 288 n. 10, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989); *Am. Petroleum Inst. v. Envt'l Protection Agency*, 72 F.3d 907 (D.C.Cir. 1996). Accordingly, this entry will be reduced by half.

But for the exceptions noted above, plaintiff's Supplemental Fee Request for the Period July, 1997-February 4 1998, included in his February 4, 1998 Submission in Compliance with Court's Orders, is approved in full.

## IV.

In sum, for reasons stated herein, and in the Memorandum and Order of December 17, 1997, plaintiff is entitled to the following attorney's fees:

SAMUEL G. KOORITZKY **$ 55,992.06**

| | | | | | |
|---|---|---|---|---|---|
| 1991: | 136 | × | $113.48 | = | $15,433.28 |
| 1992: | 122.5 | × | $116.33 | = | $14,250.43 |
| 1993: | 142.5 | × | $120.00 | = | $17,100.00 |
| 1994: | 44.1 | × | $121.73 | = | $ 5,368.29 |
| 1995: | 30.75 | × | $124.88 | = | $ 3,840.66 |
| Total | | | | = | $55,992.06 |

THOMAS G. MOORE, SR. **$ 25,441.50**

| | | | | | |
|---|---|---|---|---|---|
| 1991: | 172.0 | × | $ 35.00 | = | $ 6,020.00 |
| 1992: | 273.7 | × | $ 35.00 | = | $ 9,579.50 |
| 1993: | 181.2 | × | $ 35.00 | = | $ 6,342.00 |
| 1994: | 20.5 | × | $ 35.00 | = | $ 717.50 |
| 1995: | 50.7 | × | $ 35.00 | = | $ 1,774.50 |
| 1997: | 9.3 | × | $ 35.00 | = | $ 325.50 |
| 1998: | 19.5 | × | $ 35.00 | = | $ 682.50 |
| Total | | | | = | $25,441.50 |

CHRISTOPHER A. TERAS **$ 40,815.76**

| | | | | | |
|---|---|---|---|---|---|
| 1991: | 65.7 | × | $113.48 | = | $ 7,455.64 |
| 1992: | 69.0 | × | $116.33 | = | $ 8,026.78 |
| 1993: | 96.9 | × | $120.00 | = | $11,628.00 |
| 1994: | 24.3 | × | $121.73 | = | $ 2,958.04 |
| 1995: | 54.4 | × | $124.88 | = | $ 6,793.47 |
| 1997: | 8.3 | × | $130.06 | = | $ 1,079.50 |
| 1998: | 22.1 | × | $130.06 | = | $ 2,874.33 |
| Total | | | | = | $40,815.76 |

M. SEAN PURCELL **$ 14,481.79**

| | | | | | |
|---|---|---|---|---|---|
| 1995: | 86.7 | × | $124.88 | = | $10,827.10 |
| 1997: | 28.1 | × | $130.06 | = | $ 3,654.69 |
| Total | | | | = | $14,481.79 |

| | | | | | | |
|---|---|---|---|---|---|---|
| TAE KIM | | | | | | **$ 2,015.93** |
| 1997: | 7.5 | × | $130.06 | = | $ 975.45 | |
| 1998: | 8.0 | × | $130.06 | = | $ 1,040.48 | |
| Total | | | | = | $ 2,015.93 | |
| TOTAL FEES | | | | | | **$138,747.04** |
| **EXPENSES** | | | | | | |
| JAEGER & TERAS | | | | | | **$ 134.70** |
| TOTAL EXPENSES | | | | | | **$ 134.70** |
| **GRAND TOTAL FEES & EXPENSES** | | | | | | **$138,881.74** |

An accompanying Order implements the decisions announced herein

APPENDIX A

ESA/WHD: Wage Hour Division Home Page

http://www.dol.gov/dol/esa/public/regs/compliance/whd/wage/p29630.htm

**Employment Standards Administration**
**Wage Hour Division**

**Service Contract Act**
**Directory of Occupations**

---DISCLAIMER---

29630 PARALEGAL/LEGAL ASSISTANT (Occupational Base)

Performs a variety of legal assistance duties in an office providing legal assistance to attorneys or litigation teams. The paralegal analyzes the legal impact of legislative developments and administrative and judicial decisions, opinions, determinations, and rulings; conducts research for the preparation of legal opinions on matters of interest; performs substantative legal analysis of requests for information under the provisions of various acts; or other similar legal support functions which require discretion and independent judgement in the application of specialized knowledge of laws, precedent decisions, regulations, agency policies, and judicial or administrative proceedings. Such knowledge is less than that represented by graduation from a recognized law school, and may have been gained from formalized, professionally instructed agency or educational institution training or from professionally supervised on-the-job training. While the paramount knowledge requirements of this occupational class are legal, some positions may also require a practical knowledge of subject matter areas related to the agency's substantative programs.

---DISCLAIMER---

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**Employment Standards Administration**
**Wage Hour Division**

**Service Contract Act**
**Directory of Occupations**

---DISCLAIMER---

29631 PARALEGAL/LEGAL ASSISTANT I

Work is performed under close supervision, with required assistance readily available. Work includes, typically, several of the following duties:

Consults prescribed sources of information for facts relating to matters of interest to the program.

Reviews documents to extract selected data and information relating to specific items.

Reviews and summarizes information in prescribed format on case precedent and decisions.

Searches and extracts legal references in libraries and computer-data banks.

Attends hearings or court appearances to become informed on administrative and/or court procedures and the status of cases, and where necessary, assists in the presentation of charts and other visual information.

---DISCLAIMER---

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**Employment Standards Administration**
**Wage Hour Division**

**Service Contract Act**
**Directory of Occupations**

---DISCLAIMER---

29632 PARALEGAL/LEGAL ASSISTANT II

At this level, the incumbent, exercises more independent judgment than at the level I position. In this capacity the incumbent:

Reviews case materials to become familiar with questions under consideration.

Searches for and summarizes relevant articles in trade magazines, law reviews, published studies, financial reports, and similar materials for use of attorneys in the preparation of opinions, briefs, and other legal documents.

Prepares digests of selected decisions or opinions which incorporate legal references and analyses of precedents involved in areas of well-defined and settled points of law.

Interviews potential witnesses and prepares summary interview reports for the attorney's review.

Participates in pre-trial witness conferences, notes possible deficiencies in case materials (e.g., missing documents, conflicting statements) and additional issues or other questionable matters, and requests further investigation by other agency personnel to correct possible deficiencies or personally conducts limited investigations at the pre-trial stage.

Prepares and organizes trial exhibits, as required, such as statistical charts and photographic exhibits.

Verifies citations and legal references on prepared legal documents.

Prepares summaries of testimony and depositions.

Drafts and edits nonlegal memoranda, research reports and correspondence relating to cases.

**---DISCLAIMER---**

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**Employment Standards Administration**
**Wage Hour Division**

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---DISCLAIMER---

29633 PARALEGAL/LEGAL ASSISTANT III

At this level, participates in the substantative development of cases by performing the following functions:

Analyzes and evaluates case files against litigation worthiness standards.

Notes and corrects case file deficiencies (e.g., missing documents, inconsistent material, leads not investigated) before sending the case on to the concerned trial attorney.

Reviews and analyzes available precedents relevant to cases under consideration for use in presenting case summaries to trial attorneys.

Gathers, sorts, classifies, and interprets data to discover patterns of possible discriminatory activity.

Interviews relevant personnel and potential witnesses to gather information.

Reviews and analyzes relevant statistics.

Performs statistical evaluations such as standard deviations, analyses of variance, means, modes, and ranges as supporting data for case litigation.

Consults with statistical experts on reliability evaluations.

May testify in court concerning relevant data.

---DISCLAIMER---

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**Employment Standards Administration**
**Wage Hour Division**

**Service Contract Act**
**Directory of Occupations**

---DISCLAIMER---

29634 PARALEGAL/LEGAL ASSISTANT IV

At this level, assists in the evaluation, development and litigation of cases by performing the following duties:

Examines and evaluates information in case files, for case litigation worthiness and appropriate titles of law.

Determines the need for additional information, independent surveys, evidence, and witnesses, and plans a comprehensive approach to obtain this information.

Through on-site visits, interviews, and review of records on operations, looks for and evaluates the relevance and worth of evidence.

Selects, summarizes, and compiles comparative data to examine and evaluate respondent's deficiencies in order to provide evidence of illegal practices or patterns.

Reviews economic trends and forecasts at the national and regional level to evaluate the impact of successful prosecution and potential remedial provisions of ongoing investigations and litigation.

Identifies types of record keeping systems and types of records maintained which would be relevant. Gathers, sorts, and interprets data from various record systems including computer information systems.

Interviews potential witnesses for information and prepares witnesses for court appearances.

Develops statistics and tabulations, such as standard deviations, regression analyses, and weighting, to provide leads and supportive data for case litigation. Prepares charts, graphs, and tables to illustrate results.

Analyzes data, develops recommendations and justifications for the attorney(s) who will take the matter to court. Continues to work with the attorney(s) during the progress of the case, obtaining and developing further evidence and exhibits, providing administrative assistance, and maintaining custody of exhibits, documents, and files.

May appear in court as a witness to testify concerning exhibits prepared supporting plaintiff's case.

*ORDER*

For reasons stated in the accompanying Memorandum, and the Memorandum & Order of December 17, 1997, and the Report & Recommendation of July 17, 1997, it is this 7th day of April, 1998 hereby

ORDERED: that plaintiff's motion for reconsideration (152-1) is GRANTED IN PART AND DENIED IN PART; and it is further

ORDERED: that plaintiff's petition for attorneys' fees and expenses (46-1, 46-2) is GRANTED IN PART AND DENIED IN PART; and it is further

ORDERED: defendant shall, on or before June 15, 1998, pay $138,881.74 to plaintiff.

# United States Court of Appeals
**For The District of Columbia Circuit**

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**No. 98-5424** **September Term, 1998**

**91cv003011**

**91cv03011**

**UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT FILED: JUN 18, 1999 CLERK**

Samuel G. Kooritzky,
Appellee

v.

Alexis M. Herman, Secretary of Labor,
Appellant

---

Consolidated with 98-5438

## ORDER

It is **ORDERED**, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/ Eva Brown

Deputy Clerk

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued May 4, 1999 Decided June 18, 1999

No. 98-5424

SAMUEL G. KOORITZKY,
APPELLEE/CROSS-APPELLANT

V.

ALEXIS M. HERMAN, SECRETARY,
UNITED STATES DEPARTMENT OF LABOR,
APPELLANT/CROSS-APPELLEE

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Consolidated with
No. 98-5438

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Appeals from the United States District Court
for the District of Columbia
(No. 91cv003011)
(No. 91cv03011)

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Michael J. Ryan,* Assistant U.S. Attorney, argued the cause for appellant/cross-appellee. With him on the briefs were *Wilma A. Lewis*, U.S. Attorney, *R. Craig Lawrence*, Assistant U.S. Attorney, and *Vincent C. Costantino*, Counsel, U.S. Department of Labor.

*Christopher A. Teras* argued the cause and filed the briefs for appellee/cross-appellant. *Samuel G. Kooritzky* entered an appearance.

Before: GINSBURG, SENTELLE and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: Appellant Alexis Herman, Secretary of the Department of Labor ("DOL" or "Department"), seeks reversal of the district court's award of attorney fees under the Equal Access to Justice Act ("EAJA") to Appellee Samuel G. Kooritzky. Kooritzky cross-appeals, alleging that the district court committed errors that resulted in an unwarranted reduction in the amount of attorney fees he was awarded. We conclude that an attorney acting *pro se*, such as Kooritzky, is not entitled to recover attorney fees under the EAJA. We therefore reverse the district court's award of fees, and conclude that Kooritzky's objections to the amount of fees awarded are moot.

## I. BACKGROUND

Kooritzky, an immigration law attorney, commenced an action *pro se* in November 1991 against the Secretary of Labor, challenging promulgation of an "interim final rule" by DOL which terminated the right of employers to substitute one immigrant applicant for another in the labor certification process. The district court ruled in DOL's favor, but we reversed, concluding that DOL had promulgated its rule without adequate notice and comment. *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994).

After prevailing on the merits, Kooritzky sought to recover attorney fees from the Department. Kooritzky asserted that, in addition to his own efforts, he received assistance from attorneys Christopher Teras, M. Sean Purcell, and Tae Kim, and law clerk Thomas Moore. None of these individuals, however, had entered an appearance on Kooritzky's behalf during the merits phase of the case.

On March 1, 1995, Kooritzky moved for an award of attorney fees or $427,662 under the EAJA, 28 U.S.C. §2412(d)(1)(A), to compensate him for his and his colleagues' work. The district court referred the matter to a magistrate judge for a recommendation regarding the amount of attorney fees, if any, Kooritzky was entitled to recover. After seven days of hearings, the magistrate judge recommended that Kooritzky be awarded $31,798.71 for his own work only. Joint Appendix at 18—59. The magistrate judge concluded that Kooritzky had no representation agreement with any of his alleged co-counsel and, as a result, could not recover their attorney fees.

Both sides filed objection to the magistrate's report. On December 17, 1997, the district court issued a Memorandum on Attorney Fees, agreeing that Kooritzky was eligible for attorney fees and finding that he was entitled to the following amounts: $51,920.51 for Kooritzky, $47,689.03 for co-counsel fees, and $134.70 for photocopying charges. *Kooritzky v. Herman*, 6 F. Supp.2d 1 (D.D.C. 1997) ("*Kooritzky I*"). The court ordered the parties to submit evidence relevant to the prevailing market rate for legal assistants working as independent contractors in the Washington, D.C. area in order to assess the amount Kooritzky could recover for the work of law clerk Moore.

On May 7, 1998, following further submissions by the parties, including Kooritzky's motion for reconsideration and DOL's opposition, the district court issued its final judgment on attorney fees. *Kooritzky v. Herman*, 6 F. Supp.2d 13 (D.D.C. 1998) ("*Kooritzky II*"). The court directed that DOL pay Kooritzky the following fees by June 15, 1998: $55,992.06 for Kooritzky, $82,754.98 for co-counsel fees, and $134.70 for photocopying expenses.

On May 21, 1998, DOL moved for reconsideration based on an intervening decision by this court, *Burka v. United States Department of Health and Human Services*, 142 F.3d 1286 (D.C. Cir. 1998), in which we affirmed a decision denying attorney fees under the Freedom of Information Act ("FOIA") to a *pro se* attorney for his work and the work of his colleagues. Our decision in *Burka* was based on our reading of the Supreme Court's decision in *Kay v. Ehrler*, 499 U.S. 432 (1991). In *Kay*, the Court ruled that

the word "attorney" in the fee-shifting provision of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, assumes an agency relationship, and therefore precludes recovery of attorney fees for work done by an attorney acting *pro se*. In *Burka*, we held that the reasoning of *Kay* compelled denial of attorney fees to a lawyer acting *pro se* under the similar fee-shifting provision in FOIA. 142 F.3d at 1288—89. On June 9, 1998, the district court denied DOL's motion, concluding that there were differences between FOIA and EAJA that counseled against application of the *Kay* decision in EAJA cases. The parties subsequently filed these appeals.

## II. ANALYSIS

The Department challenges the district court's award of attorney fees for both (1) Kooritzky's own work and (2) the work of Kooritzky's co-counsel. Since the analysis for the two categories of fees differs, we address them separately.

### *A. Attorney Fees for Work Performed by Kooritzky*

DOL argues that the district court erred in awarding attorney fees to Koortizky since he was acting *pro se*. In particular, DOL contends that the district court mistakenly relied upon this court's decision in *Jones v. Lujan*, 887 F.2d 1096 (D.C. Cir. 1989), allowing recovery of attorney fees by a *pro se* attorney-litigant under the EAJA. *See Kooritzky I*, 6 F. Supp.2d at 3. DOL submits that our decision in *Jones* was implicitly overruled by the Supreme Court in *Kay v. Ehrler*, 499 U.S. 432 (1991), disallowing recovery of attorney fees to *pro se* plaintiffs under the fee-shifting provision found in 42 U.S.C. §1988. Kooritzky contends that the district court correctly relied on this court's decision in *Jones*, which he asserts remains the controlling law of this circuit despite the Supreme Court's subsequent decision in *Kay*. He argues that the *Kay* opinion was limited to cases brought under the Civil Rights Attorney's Fees Awards Act and that, while *Kay* resolved a "statutory ambiguity" by examining the specific legislative history of that Act, the *Jones* holding was based on the clear and unambiguous language of the EAJA. Upon review, we conclude that the fee-shifting provision of EAJA does not differ in any material way from the statutes construed by the Supreme Court in *Kay* and by this court in *Burka*. We therefore hold that our decision in *Jones* has been overruled by

the Supreme Court, and that the district court erred in awarding fees to the *pro se* litigant under EAJA.

In the United States, fee shifting is a departure from the norm. In the general run of litigation, the "American rule" dictates that each party to a lawsuit bears his own attorney fees. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Congress has specified exceptions to this American rule in a number of statutory schemes in the form of fee-shifting provisions which allow recovery of attorney fees by a "prevailing party." *See West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 89 (1991) (noting that "[a]t least 34 statutes in 10 different titles of the United States Code explicitly shift attorney's fees *and* expert witness fees"). The governing fee-shifting statute for EAJA awards is 28 U.S.C. §2412(d)(1)(A):

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The EAJA elsewhere defines "fees and expenses" to include "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees." *Id* §2412(d)(2)(A).

In *Kay v. Ehrler*, the Supreme Court considered the entitlement to fees of a lawyer litigating *pro se* in a civil rights action. The Civil Rights Attorney's Fees Awards Act provided that in such an action, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. §1988(b). After noting that it was already fixed law "that a *pro se* litigant who is *not* a lawyer is *not* entitled to attorney's fees," *Kay*, 499 U.S. at 435 (emphasis in original), a unanimous Supreme Court held that the same rule applied to a *pro se* litigant who *is* a lawyer. While the court allowed that neither the text nor the legislative history of the statute provided "a clear

answer," it firmly declared that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under §1988." *Id.* at 435—36. In so declaring, the Court cited the definition of the word "attorney" as " '[O]ne who is legally appointed by another to transact business for him; *specif:* a legal agent qualified to act for suitors and defendants in legal proceedings.' " *Id.* at 436 n.6 (quoting *Webster's New Collegiate Dictionary* 73 (1975)). The Court therefore concluded that the *pro se* litigant, even though a qualified lawyer, is not entitled to attorney fees for his own time, but may only collect fees for work performed by third parties employed to act as his attorneys at law in the litigation.

Although the definitional support for the holding might have been sufficient, the Court buttressed its conclusion with an examination of the purpose of the statute. While recognizing that the fee-shifting provision "was no doubt intended to encourage litigation protecting civil rights," the Court further noted that "it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Id.* at 436. There is no limiting language in the *Kay* opinion to make us believe that the Supreme Court intended its reasoning to apply only to the specific statute before it. Other fee-shifting statutes also speak of "attorney's" fees. The definitional implication of an agency relationship in the EAJA provision is therefore just as strong as in the Civil Rights Act. Therefore, in *Burka*, we had no difficulty in holding that the fee-shifting provision of the Freedom of Information Act, 5 U.S.C. §552(a)(4)(E) (1994), was governed by *Kay* and that a *pro se* attorney-litigant pursuing a remedy under FOIA, like his counterpart in a civil rights action, was not entitled to an award of attorney fees. As the Supreme Court had done in *Kay*, we noted in *Burka* that a contrary rule would be counter to one purpose of the statute—that is, " 'to encourage potential claimants to seek legal advice before commencing litigation.' " *Burka*, 142 F.3d at 1289 (quoting *Kay*, 499 U.S. at 435 n.4) (other citations and internal quotations omitted).

As both the *Burka* and *Kay* opinions further note, "although a *pro se* attorney possesses legal expertise, he is unlikely to have the

'detached and objective perspective necessary to fulfill the aims of the Act.' " *Burka*, 142 F.3d at 1289 (quoting *Kay*, at 435 n.4) (other internal quotations and citations omitted). Thus, *Burka* reflects a conviction that nothing in the Supreme Court's *Kay* opinion limits its reasoning to the specific facts or statute before it. Nor does anything in the reasoning of *Kay* or *Burka* draw a line excluding the EAJA from the analysis controlling the application of the other fee-shifting statutes.

The EAJA uses precisely the same wording—"attorney's fees"—construed to imply the necessity of an agency relationship in the other acts. Nothing in the statute defeats that implication. Not only does this similarity in wording suggest that the EAJA, like the FOIA, is controlled by the same reasoning applied by the Supreme Court to the Civil Rights Act, the Supreme Court itself has noted in the past the similarity between the fee-shifting provisions of the EAJA and Section 1988, observing that the EAJA is "the counterpart to §1988 for violation of federal rights by federal employees." *See West Virginia Univ. Hosps.*, 499 U.S. at 89; *see also Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) ("[F]ee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike.").

The district court, faced with an apparently controlling precedent from this court in *Jones* compelling one result and a later decision of the Supreme Court arguably but not directly overruling that decision, concluded that Kooritzky "presented a persuasive argument that the [EAJA] differs in both language and purpose from the attorneys' fee provisions of the Civil Rights Act and the Freedom of Information Act." *Kooritzky I*, 6 F. Supp.2d at 3. We cannot agree. The relevant fee-shifting provisions of the Civil Rights Attorney's Fees Awards Act and the EAJA are the same in one controlling particular: both provide for recovery of "attorney's fees." Thus, a straightforward analysis of the statutory text is sufficient to conclude that, as in the case of the Civil Rights Attorney's Fees Awards Act provision, a *pro se* attorney-litigant may not recover attorney fees under the comparable fee-shifting provision of the EAJA.

Neither is there a difference of purpose in the statute that impels us toward any different result. In concluding that the plaintiff had

"presented a persuasive argument that the [EAJA] differs in both language and purpose from the attorney's fee provision of the Civil Rights Act and the [FOIA]" construed in *Kay* and *Burka*, the district court cited *Spencer v. NLRB*, 712 F.2d 539, 550 (D.C. Cir. 1983), as "enumerating purposes of the Equal Access to Justice Act." *Kooritzky I*, 6 F. Supp.2d at 3. We have reviewed the goals we set forth in *Spencer*: (1) to provide relief to victims of abusive governmental conduct without assuming "enormous financial burdens"; (2) "to reduce the incidence of such abuse"; and (3) to "expos[e] a greater number of governmental actions to adversarial testing." 712 F.2d at 550. We find none of these to be inconsistent with the corresponding goals of the Civil Rights Act underlying the fee-shifting provision of 42 U.S.C. §1988. Indeed, we must echo the Supreme Court's declaration in *West Virginia University Hospitals* that EAJA is in a sense a counterpart of the civil rights statute. In neither instance does the general goal of encouraging vindication of rights warrant an award of attorney fees where no attorney-client relationship exists and where the goal of the filtering of litigation through an independent professional is not met.

In *Kay*, the Court determined that a lawyer who appears *pro se* is "deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom." 499 U.S. at 437. Thus, the Court concluded that "[t]he statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." *Id.* at 438.

The same policy goals undergird the EAJA. As this court has observed, "[b]oth the Civil Rights Attorney's Fees Award Act ... and the EAJA were designed to supplement a host of more specific provisions allowing for the award of attorneys' fees in suits brought under statutes granting or protecting various federal rights." *Spencer*, 712 F.2d at 545 n.18; *see also Celeste v. Sullivan*, 988 F.2d 1069, 1070 (11th Cir. 1992) ("The fee shifting provisions in section 1988 and in the EAJA serve the same purposes"). Like the Civil Rights Attorney's Fees Awards Act, the policy goals underlying the fee-shifting provision found in the EAJA support the

conclusion that Congress sought to encourage the procurement of objective counsel to pursue claims against the government for violation of various federal rights. *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980) (fee-shifting enacted to aid citizens for whom "the inability to recover attorney fees preclude[d] resort to the adjudicatory process"); *id.* at 12 (noting that under the EAJA, "fee shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority"). In doing so, Congress contemplated that attorney and client would be distinct individuals. *See id.* at 15 ("[T]he computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client."). Thus, as in *Kay*, our interpretation of the EAJA is consistent with underlying policy goals and congressional prupose.

Our prior applications of the Supreme Court's decision in *Kay* further support our ruling in this case. We have already held that the Supreme Court's holding in *Kay* extends beyond the Section 1988 context. In *Burka v. United States Department of Health and Human Services*, 142 F.3d 1286 (D.C. Cir. 1998), we ruled that *pro se* plaintiffs could not recover attorney fees under the fee-shifting provision in FOIA. In doing so, we concluded that *Kay* overruled prior decisions of this court holding that a *pro se* attorney-litigant was entitled to recover attorney fees under the fee-shifting provisions of FOIA. *Id.* at 1288 (citing *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977)). As a result of our analysis of the *Kay* decision, we concluded that "the Supreme Court intended its ruling to apply beyond section 1988 cases to other similar fee-shifting statutes, particularly the one in FOIA. It is, in short, impossible to conclude otherwise than that *pro se* litigants who are attorneys are not entitled to attorney's fees under FOIA." *Id.* at 1289; *see also Benavides v. Bureau of Prisons*, 993 F.2d 257, 259 (D.C. Cir. 1993) (denying attorney fees under FOIA to a *pro se* non-attorney on the grounds that "the Supreme Court believes that the word 'attorney,' when used in the context of a fee-shifting statute, does not encompass a lay-person proceeding on his own behalf"). Thus, in *Burka*, we stated the position of this court that the Supreme Court's decision in *Kay* applies outside of the Section

1988 context, extending to all similarly-worded fee-shifting provisions. We reaffirm that holding today.

In so ruling, we join a number of other circuits that have ruled that *Kay* compels the conclusion that *pro se* plaintiffs may not recover attorney fees under the EAJA. In *SEC v. Waterhouse*, the Second Circuit applied *Kay* to bar recovery of attorney fees by a *pro se* attorney-litigant, observing that the "agency relationship [is absent] in the *pro se* context." 41 F.3d 805, 808 (2d Cir. 1994). Similarly, in *Celeste v. Sullivan*, the Eleventh Circuit concluded that because the fee-shifting provisions in the Civil Rights Attorney's Fees Awards Act and the EAJA serve the same purposes, the Supreme Court's decision in *Kay* barred recovery of attorney fees under the EAJA by a *pro se* non-attorney. 988 F.2d 1069, 1070 (11th Cir. 1992). Finally, in *Demarest v. Manspeaker*, the Tenth Circuit denied attorney fees under the EAJA to a *pro se* litigant, concluding that, like the Civil Rights Attorney's Fees Awards Act, the EAJA "attempts to enable meritorious litigation to take place, not to reward individuals who obtain legal redress." 948 F.2d 655, 656 (10th Cir. 1991).

*B. "Expert Witness" Expenses*

Not content to rest on his argument that this court's decision in *Jones* is controlling, however, Kooritzky further claims that he is entitled to recover fees under 28 U.S.C. §2412(d)(2)(A) for time he spent acting as an immigration law "expert" in his own case. Kooritzky contends that the district court correctly found that he played a "dual role" in the litigation and that he both "participated in the advocacy role of an attorney" and "participated as an expert in immigration law as a supporter of his colleagues in the 'study ... and analysis' of the specialized immigration law and policy issues presented by this litigation." *Kooritzky I*, 6 F. Supp.2d at 4. Kooritzky extrapolates from this finding to the conclusion that he is entitled to recover fees for his work as an "expert witness" even if he is not entitled to recover "attorney fees" for the same work.

DOL argues that Kooritzky should not be allowed to "sidestep" his preclusion from recovering attorney fees by characterizing the fees as "expert" expenses. DOL observes that the district court agreed that this was a "routine APA case" and contends that therefore no expert studies were required and that "the substantial

amounts of time wasted by plaintiff hardly qualify him for compensation as an expert." DOL Reply Brief at 2, 10. DOL also maintains that Kooritzky characterized the fees he claimed as attorney fees and that he cannot now claim that these amounts represent compensation for time he spent preparing the case as an expert witness.

We agree that a *pro se* attorney-litigant may not evade the prohibition against recovery of attorney fees under the EAJA by seeking to characterize himself as an "expert witness." The EAJA provides that litigants may recover "fees and other expenses" incurred in pursuing claims regarding alleged violations of various federal rights. Elsewhere, this phrase is defined as follows:

> "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees.

28 U.S.C. §2412(d)(2)(A). On its face, therefore, the statutory language provides for the recovery of "reasonable expenses of expert witnesses" in addition to "reasonable attorney's fees." Unlike the term "attorney," the phrase "expert witness" arguably does not connote as readily the sort of agency relationship that would support a reading of the statute requiring that the litigant and expert witness be separate individuals before expenses may be awarded.

However, it is not at all unlikely that Congress intended that expert witnesses, like attorneys, should be distinct from litigants. EAJA with its net worth threshold, *see* 28 U.S.C. §2412(d)(2)(B), apparently contemplates placing less solvent litigants facing the government as an adversary on a basis similar to the multimillionaire engaged in the same type of litigation. Appellee has shown us no precedent for a litigant, wealthy or otherwise, receiving witness fees, expert or plain, for his own litigation. Indeed, it would seem a strange incentive to provide witness fees not for the purpose of reimbursing a litigant for his out-of-pocket costs, but as salary for time spent as a witness in his own litigation. Moreover, as the Supreme Court noted in *Kay* "[e]thical considerations may make it inappropriate for [a *pro se* lawyer] to appear as a witness." *Kay*, 499 U.S. at 437 n.9 (citing the ABA

Model Code of Professional Responsibility: "[t]he roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."). We find decidedly uncompelling an argument that we should enter a novel holding proving an incentive to tread that questionable ethical ground.

The rationale of *Kay* further counsels in favor of barring recovery of expenses incurred by a litigation acting as his own expert. The Court in *Kay* noted that Congress in enacting various fee-shifting provisions sought to encourage plaintiffs to hire objective outside counsel:

> A rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

499 U.S. at 436. By analogy, the same congressional policy is served by a rule that encourages plaintiffs to retain objective outside experts. Thus, Kooritzky's cliam for fees, whether characterized as "attorney fees" or "expert expenses" must fail.

In any event, the statutory language also makes plain that "attorney fees" and expert witness expenses are separate and distinct items of expense. *See West Virginia Univ. Hosps.*, 499 U.S. at 92 (concluding that under the background against which Congress enacted the fee-shifting provision of the Civil Rights Attorney's Fees Awards Act, "[e]xpert fees were regarded not as a subset of attorney's fees, but as a distinct category of litigation expense"). Allowing a *pro se* attorney-litigant to recover fees for legal services rendered during the course of litigation by characterizing them as "expenses of expert witnesses" or the "reasonable cost" of various studies, rather than "attorney fees" would vitiate the holding of *Kay* as applied to the EAJA and would make the determination of fee eligibility rest solely on the semantics of the litigant's fee petition. Therefore, we hold that a lawyer-litigant acting *pro se* may not recover fees for acting as an

"expert witness" in his own case, at least, where the "expertise" possessed by the litigant is essentially legal in nature.

Such a rule is particularly warranted in a case such as this where the legal "expertise" claimed by the litigant is of limited relevance to the subject matter of the underlying suit. Kooritzky's alleged legal expertise consists of his knowledge of immigration law. His suit, however, challenged a DOL regulation on the ground that it was promulgated in violation of notice and comment provisions of the Administrative Procedure Act—an issue of administrative, not immigration, law. Moreover, the record contains evidence that Kooritzky lacked the very expertise that was most required in this case—experience trying administrative law cases in the federal courts. Indeed, the district court observed that Kooritzky "admitted [his] absence of court experience." *Kooritzky*, 6 F. Supp.2d at 8. Such circumstances demonstrate the danger of a holding that would allow attorney-litigants to evade the Court's pronouncement in *Kay* by proclaiming themselves legal "experts" and thereby allowing them to recover attorney fees relabeled as "expert expenses."

### *C. Attorney Fees for Work Performed by Kooritzky's "Co-Counsel"*

In addition to seeking reversal of the district court's award of attorney fees for legal work performed by Kooritzky in his own case, DOL argues that Kooritzky should not have been permitted to recover attorney fees for the work of his colleagues. The Department relies primarily on our ruling in *Burka* that a *pro se* attorney-litigant must demonstrate that he and his co-counsel have a "genuine attorney-client relationship" and that his co-counsel are exercising "independent" judgment before he may be awarded attorney fees for their work under the EAJA. 142 F.3d at 1291—92. DOL agues that the rationale of *Burka* applies in this cae even though Kooritzky's co-counsel are not employees of his law firm, as were the attorneys in *Burka*. DOL Reply Brief at 12. Kooritzky responds that he need only demonstrate that a valid attorney-client relationship existed between him and his co-counsel. While admitting that he never had a written agreement with any of his co-counsel, Kooritzky asserts that no such agreement is necessary for there to be a valid attorney-client relationship.

DOL is correct that our analysis in *Burka* is controlling. Our holding in *Burka* dictates that a *pro se* attorney-litigant must demonstrate that he and his co-counsel have a "genuine attorney-client relationship" and that his co-counsel are "independent" before attorney fees may be awarded. 142 F.3d at 1291—92. We concluded that this requirement followed from the Supreme Count's ruling in *Kay* that the term "attorney" used in a similarly-worded fee-shifting statute " 'assumes an agency relationship' " that bars recovery of attorney fees for work performed by all those who are not "independent third part[ies]." *Id.* at 1291 (quoting *Kay*, 499 U.S. at 435—36, 437). Adhering to the Supreme Court's reasoning we denied recovery of fees to a *pro se* attorney-litigant who (1) controlled the legal strategy and presentation in his own case, (2) was the only attorney to enter an appearance in the case, and (3) directed the work of his colleagues who were employed by the attorney-litigant's law firm. *Id.* We distinguished cases relied upon by the plaintiff in *Burka* in which *pro se* litigants were allowed to recover fees, noting:

> In all three cases, the court awarded attorney's fees to a *pro se* attorney-litigant for the work of co-counsel. Yet, as the district court noted below, all three cases involved attorneys who were not affiliated with the litigant's law practice. As a result, these outside counsel, unlike the colleagues employed by Burka, enjoyed a genuine attorney-client relationship with the litigants, were situated to offer "independent" legal advice and assistance, and were presumably paid for their services by the attorney-litigants involved. This was not true here. Instead, Burka controlled the legal strategy and presentation, he was the only attorney to enter an appearance in the case, and his colleagues worked under his direction. These are material differences.

*Id.* at 1291. We concluded that, based on these factors, co-counsel in *Burka* lacked the requisite independence necessary for recovery of attorney fees under the fee-shifting provision found in FOIA.

The same analysis applies under the EAJA. A *pro se* attorney-litigant seeking to obtain attorney fees under the EAJA for work performed by co-counsel must demonstrate that his colleagues are situated to offer "independent" legal advice and assistance. As we demonstrated above, the Supreme Court's conclusion in *Kay* that the term "attorney" contemplates an agency relationship between a

litigant and an independent lawyer applies not only to the fee-shifting provisions of the Civil Rights Attorney's Fees Awards Act, but to all similarly-worded fee-shifting provisions, including that found in the EAJA.

Applying the test we outlined in *Burka*, we conclude that Kooritzky has not shown that his co-counsel evidenced the independence necessary for recovery of fees under the EAJA. We further conclude that Kooritzky and his co-counsel did not enjoy a genuine attorney-client relationship for purposes of the fee-shifting provision of the Act. As the district court noted, the relationship between Kooritzky and his "co-counsel" was "unusual." *Kooritzky I*, 6 F. Supp.2d at 5. As in *Burka*, none of Kooritzky's co-counsel entered an appearance on his behalf during the merits phase of the case. The only appearance by co-counsel on behalf of Kooritzky occurred after Kooritzky had prevailed on the merits when the district court was determining the amount of attorney fees, if any, Kooritzky was entitled to receive. There was no formal agreement between Kooritzky and his colleagues concerning fees for legal services rendered. None of Kooritzky's alleged co-counsel ever billed him for legal services rendered. Moreover, his co-counsel did not even keep accurate records of the time they allegedly spent on Kooritzky's case. After reviewing the evidence, the magistrate judge observed that " '[n]obody expected to get paid.' " *Id.* (citing Magistrate Report and Recommendation at 39).

Indeed, as Kooritzky's counsel acknowledged during oral argument, it was only after Kooritzky had prevailed on the merits that he and his colleagues realized that they might be able—in his words—to "stick the government" for attorney fees. Once this realization dawned upon them, they proceeded to reconstruct the hours spent working on this case, leading to protracted litigation below concerning the amount of fees to which they were entitled. *See id.* at 8 (noting that "plaintiff's inexperience and disorderly record keeping imposed an enormous and unnecessary burden on the Court and the Magistrate Judge"). In engaging in such practices, Kooritzky and his colleagues ignored the admonition of the Supreme Court in *Hensley* that "[a] request for attorney's fees should not result in a second major litigation." 461 U.S. at 437. While the facts in this case differ from those in *Burka* in that

Kooritzky's co-counsel, unlike the attorneys in *Burka*, are not employed by his law firm, this fact alone is not dispositive.

We are not holding that in every instance an EAJA litigant must show that each attorney for whom he is entitled to counsel fees entered an appearance in the case. We do however hold that such fees must be for a professional who has in fact acted in an attorney-client relationship with the fee claimant in the relevant EAJA litigation. Kooritzky has not made the necessary showing. Did the lawyers for whom he claims recompense receive or contemplate fees? According to the record they did not. Did they appear for him in the merits phase of the case? According to the record they did not. Did they enter an attorney-client relationship with reference to this litigation? So far as the record shows, they did not. They may have counseled him, they may have advised him, but they did not provide the function recognized in *Kay v. Ehrler* of "filtering out meritless claims." 499 U.S. at 437. The litigant himself acted as sole trial counsel. He was the final filter. He, like the FOIA litigant in Burka, "controlled the legal strategy and presentation," and "was the only attorney to enter an appearance," at least in the merits phase of the case. 142 F.3d at 1291. Like the litigant in *Burka*, he cannot collect attorney fees for professionals who did not act as his attorneys.[1]

*D. Kooritzky's Cross-Appeal*

Having concluded that Kooritzky may not recover attorney fees for work performed by either himself or his colleagues, we need not reach the merits of Kooritzky's objections to the amount of the fee award. Specifically, Kooritzky argues that the district court erred by (1) failing to increase his attorney fee award to compensate him for "special factors" permitted under 28 U.S.C. §2412(d), (2) failing to permit him to submit a supplemental fee request, and (3) refusing to allow him to submit a fee petition for work conducted in preparation for hearings before the magistrate judge. However, because Kooritzky is not entitled to any attorney fees under the EAJA, his objections to the amount of the fee award are moot.

1. The exact status of the law clerk "Thomas Moore" for whom Kooritzky claims fees is the matter of gravest confusion in the record. Apparently he was a student for the bar under a "reading law" method of eligibility in a state adjoining the District of Columbia. So far as we can tell, he was neither eligible for nor did he receive any sort of fees.

## III. CONCLUSION

For the foregoing reasons, we hold that a *pro se* attorney-litigant may not recover attorney fees under EAJA, 28 U.S.C. §2412(d)(1)(A). We further hold that a *pro se* attorney-litigant may not recover attorney fees under the EAJA for the work of his co-counsel where the attorney and his colleagues lack a genuine attorney-client relationship. Accordingly, the district court's award of fees is reversed.

# United States Court of Appeals
**For The District of Columbia Circuit**

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**No. 98-5424** **September Term, 1998**
**91cv003011**
**91cv03011**

**UNITED STATES COURT
OF APPEALS FOR DISTRICT
OF COLUMBIA CIRCUIT
FILED: AUG. 23, 1999
CLERK**

Samuel G. Kooritzky,
Appellee

v.

Alexis M. Herman, Secretary of Labor,
Appellant

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Consolidated with 98-5438

**BEFORE** Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

## ORDER

Upon consideration of appellee/cross-appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

Per Curiam

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/ Robert Bonner

Robet A. Bonner
Deputy Clerk

Circuit Judges Wald and Tatel did not participate in this matter.

Supreme Court, U.S.
FILED
JAN 21 2000
CLERK

No. 99-867

# In the Supreme Court of the United States

SAMUEL G. KOORITZKY, PETITIONER

*v.*

ALEXIS M. HERMAN, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether a pro se litigant who is also a lawyer may be awarded attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d), for the time he spent on his case or for the time spent on his case by other lawyers where petitioner did not establish that the other lawyers offered independent legal advice or assistance.

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# In the Supreme Court of the United States

No. 99-867

SAMUEL G. KOORITZKY, PETITIONER

*v.*

ALEXIS M. HERMAN, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 56a-72a) is reported at 178 F.3d 1315. The opinions of the district court (Pet. App. 1a-25a, 26a-54a) are reported at 6 F. Supp. 2d 1 and 6 F. Supp. 2d 13.

### JURISDICTION

The judgment of the court of appeals was entered on June 18, 1999. A petition for rehearing en banc was denied on August 23, 1999 (Pet. App. 73a). The petition for a writ of certiorari was filed on November 22, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner filed a successful lawsuit, pro se, in the United States District Court for the District of Columbia, against the Secretary of Labor, challenging the Department of Labor's promulgation of an interim final rule regarding immigrants for whom labor certifications are sought. Pet. App. 4a, 57a (citing *Kooritzky* v. *Reich*, 17 F.3d 1509 (D.C. Cir. 1994)).[1] Petitioner is a lawyer by profession and moved for an award of attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d).[2] Petitioner sought an award of $427,662 under the EAJA, contending that he should recover attorney's fees for the time he spent on the case, as well as for time spent on the case by other lawyers and a law clerk. Pet. App. 57a-58a.

A magistrate judge recommended that petitioner be awarded $31,798.71 for his own work only. Pet. App.

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[1] Petitioner is an immigration lawyer who "sought to employ an alien for whom he was seeking certification as an 'employment-based' immigrant." Pet. App. 4a. The challenged rule "terminated the right of employers to substitute one immigrant applicant for another in the labor certification process." *Id.* at 57a.

[2] The EAJA provides in relevant part:

> [A] court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. 2412(d)(1)(A). The EAJA defines fees and expenses to include "the reasonable expenses of expert witnesses * * * and reasonable attorney fees." 28 U.S.C. 2412(d)(2)(A).

58a. The magistrate judge recommended against an award of fees for any work by the other lawyers or paralegal because petitioner had no representation agreement with any of them and incurred no expense or obligation to pay them. *Id.* at 9a, 58a.

The district court accepted in part, and rejected in part, the magistrate judge's recommendation. Pet. App. 1a-25a; *id.* at 26a-56a. The court agreed that, under governing circuit law, petitioner was entitled to recover attorney's fees for his pro se work. *Id.* at 6a (citing *Jones* v. *Lujan*, 887 F.2d 1096, 1097 (D.C. Cir. 1989)). The court also ruled, however, that petitioner was entitled to recover attorney's fees for work performed by other lawyers and a paralegal. Pet. App. 10a-24a. The court awarded petitioner $55,992.06, for petitioner's own work and $82,754.98 for "co-counsel" fees. *Id.* at 58a.

2. The court of appeals reversed. Pet. App. 56a-72a. The court ruled that a lawyer acting pro se is not entitled to recover attorney's fees under the EAJA. The court concluded that its decision in *Jones* v. *Lujan*, *supra*, allowing recovery of attorney's fees under the EAJA by a pro se lawyer-litigant, was overruled by this Court's decision in *Kay* v. *Ehrler*, 499 U.S. 432 (1991), that a lawyer acting pro se may not recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988(b).

The court of appeals reasoned that the EAJA does not differ in any material way from Section 1988 which was at issue in *Kay*. Pet. App. 59a. The court also noted its own precedent regarding the attorney's fees provision under the Freedom of Information Act which it had construed, consistent with *Kay*, to bar an award to a pro se lawyer for his work and the work of his lawyer colleagues. *Id.* at 58a (citing *Burka* v. *United*

*States Dep't of Health & Human Servs.*, 142 F.3d 1286 (D.C. Cir. 1998)). The court of appeals emphasized that, in *Kay*, this Court "firmly declared" that the statute's use of the term "attorney" assumes "an agency relationship" and the *Kay* Court found it likely that "Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." Pet. App. 61a. The *Kay* Court buttressed its conclusion by relying on Section 1988's specific purpose "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Ibid.*

The court of appeals found no language in the *Kay* opinion suggesting that its rationale does not apply to a straightforward analysis of the text of other statutes, such as that involved in this case, that also speak of "attorney" fees. The court also relied on the similarities between the policies and purposes underlying the fee-shifting provisions of the EAJA and those of Section 1988. The court pointed out that a contrary rule would undermine another purpose of the statutes at issue in *Kay*, *Burka*, and this case, which is "to encourage potential claimants to seek legal advice before commencing litigation," because a pro se lawyer is "unlikely to have the 'detached and objective perspective necessary to fulfill the aims of the Act.'" Pet. App. 61a-62a. As in Section 1988, "the policy goals underlying the fee-shifting provision found in the EAJA support the conclusion that Congress sought to encourage the procurement of objective counsel to pursue claims against the government for violation of various federal rights." *Id.* at 63a-64a. The court noted that its ruling was consistent with opinions of the Second, Tenth, and Eleventh Circuits. *Id.* at 65a.

The court of appeals rejected petitioner's effort to "evade the prohibition against recovery of attorney fees

under the EAJA by seeking to characterize himself as an 'expert witness.'" Pet. App. 66a. The court noted that the claimed legal expertise was of questionable relevance, that petitioner's argument would mean that fee eligibility would "rest solely on the semantics of the litigant's fee petition," that statutory policy would be furthered by retention of objective outside experts, and that ethical questions would be raised by a pro se lawyer's acting as a witness. *Id.* at 66a-68a.

The court of appeals also held that petitioner was not eligible for attorney's fees for work performed by his purported "co-counsel." Pet. App. 68a. The court explained that, consistent with its *Burka* opinion and the *Kay* Court's conclusion that the term "attorney" assumes an agency relationship between the litigant and an independent lawyer, "[a] *pro se* attorney-litigant seeking to obtain attorney fees under the EAJA for work performed by co-counsel must demonstrate that his colleagues are situated to offer 'independent' legal advice and assistance." *Id.* at 69a. The court found that petitioner had not made such a showing here because the only entry of appearance on behalf of petitioner by any of the other lawyers was after petitioner prevailed on the merits and the court was determining the amount of fees, if any, petitioner could receive. *Id.* at 70a. The court also pointed to the fact that there was no formal agreement between petitioner and the other lawyers concerning fees for legal services rendered, no bills by any of the other lawyers for legal services rendered, and no accurate records kept by any of the other lawyers of time spent on the case, all of which indicated that petitioner's purported "co-counsel" were not, in fact, acting as his attorneys. *Id.* at 70a-71a. The court also noted that the record regarding a law clerk for whom petitioner sought fees was very

confusing, but that "[s]o far as [the court could] tell, he was neither eligible for nor did he receive any sort of fees." *Id.* at 71a n.1.[3]

**ARGUMENT**

Petitioner challenges the court of appeals' ruling that petitioner, as a pro se lawyer litigant, is not entitled to an attorney's fees award under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), for his own work on his case. He also maintains that he should be able to recover a fee award for work performed by other lawyers and a paralegal. The court of appeals correctly rejected petitioner's claims and petitioner does not identify any issue that warrants further review by this Court.

1. Petitioner contends (Pet. 9-14) that the court of appeals erred in applying the rationale of *Kay* v. *Ehrler*, 499 U.S. 432 (1991), to the instant case which involves the attorney's fees provision in the EAJA, rather than 42 U.S.C. 1988 which was at issue in *Kay*. He argues that, because an award of attorney's fees is mandatory under the EAJA, rather than discretionary as under Section 1988, and because the EAJA does not involve the type of civil rights violations at issue in Section 1988 cases, a different analysis of the attorney's fees provision should govern EAJA cases. He claims (Pet. 11-12) that courts are in disagreement about the availability of attorney's fees under such fee-shifting statutes.

a. Although petitioner identifies two differences between the EAJA and Section 1988, *i.e.*, that the

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[3] In light of its ruling that petitioner was not entitled to any attorney's fees under the EAJA, the court found petitioner's objection to the amount of the fee award to be moot. Pet. App. 71a.

former provision is mandatory and is not limited to civil rights claims, he does not explain why those differences should require a different interpretation of the term "attorney" under the two statutory fee-shifting provisions. The court of appeals correctly rejected petitioner's argument, analyzing the statutory texts as well as the underlying purposes and policies and concluding that, under the EAJA, the term "attorney" is properly interpreted, as it was by this Court in *Kay*, to assume the existence of an agency relationship between the litigant and an independent lawyer and, thus, not to allow attorney's fee awards to pro se litigants who are lawyers. The court of appeals also correctly indicated that its interpretation of the two statutes in a similar manner is consistent with the fact that this Court "has noted in the past the similarity between the fee-shifting provisions of the EAJA and Section 1988, observing that the EAJA is 'the counterpart to § 1988 for violation of federal rights by federal employees.'" Pet. App. 62a (citing *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 89 (1991)). The court of appeals' interpretation of the EAJA attorney's fees provision is correct because it is consistent with the ordinary meaning of "attorney" (see Pet. App. 61a) and furthers the statute's policy goal "to encourage the procurement of objective counsel to pursue claims against the government for violation of various federal rights" (*id.* at 63a-64a).

b. Petitioner errs in contending (Pet. 11-12) that the decision below conflicts with the reasoning in *Doe* v. *Board of Education*, 165 F.3d 260 (4th Cir. 1998), cert. denied, 119 S. Ct. 2049 (1999), and *SEC* v. *Waterhouse*, 41 F.3d 805, 808 (2d Cir. 1994)).

In *Doe*, the Fourth Circuit held that a lawyer was not entitled to an attorney's fee award for legal services

he performed in obtaining special education benefits for his child under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* Although the court found that *Kay* did not "precisely parallel" that case because, under IDEA, the parent lawyer was not, in fact, acting pro se because he was advancing his child's rights rather than his own, the court found that the central rationale of *Kay* applied. 165 F.3d at 264. The court expressly relied on *Kay's* holding that "encouraging independent representation by prohibiting statutory awards to pro se attorney-plaintiffs furthered the fee-shifting statute's purpose of encouraging the effective prosecution of meritorious claims." *Id.* at 265 (citing *Kay*, 499 U.S. at 437). Moreover, the Fourth Circuit noted that two other circuits had found *Kay's* rationale to apply to the attorney's fee provision of the Freedom of Information Act. 165 F.3d at 262 (citing *Burka* v. *United States Dep't of Health & Human Servs.*, 142 F.3d 1286, 1290 (D.C. Cir. 1998); *Ray* v. *United States Dep't of Justice*, 87 F.3d 1250, 1252 (11th Cir. 1996))).

In *SEC* v. *Waterhouse*, the Second Circuit expressly held that "the Supreme Court's decision in *Kay* should also control under the EAJA." 41 F.3d at 808. That court also noted that the other courts of appeals that had ruled on the issue had reached the same conclusion. *Ibid.* (citing *Hexamer* v. *Foreness*, 997 F.2d 93, 94 (5th Cir. 1993); *Demarest* v. *Manspeaker*, 948 F.2d 655 (10th Cir. 1991), cert. denied, 503 U.S. 921 (1992); *Merrell* v. *Block*, 809 F.2d 639, 642 (9th Cir. 1987)).

Thus, the court of appeals here correctly observed that its ruling is in accord with the decisions of other circuits. Pet. App. 65a (citing *SEC* v. *Waterhouse*, 41 F.3d at 808; *Celeste* v. *Sullivan*, 988 F.2d 1069, 1070 (11th Cir. 1992); and *Demarest* v. *Manspeaker*, 948 F.2d

at 656). Although, as the court below recognized, some cases from other circuits have involved non-lawyer pro se litigants, nothing in those opinions is inconsistent with the ruling below.

2. Petitioner claims (Pet. 11, 14-17) that the court of appeals erred in holding that he did not have a bona fide attorney-client relationship with the other lawyers for whose work he also sought an attorney's fees award. He also contends (Pet. 18-19) that he is entitled to a fee award for the work performed by a paralegal.

a. Petitioner does not challenge the court of appeals' legal ruling that a pro se litigant who is a lawyer seeking recovery of attorney's fees for work performed by other lawyers must demonstrate that the other lawyers were "situated to offer 'independent' legal advice and assistance." Pet. App. 69a. Rather, petitioner argues that, in fact, he had an actual, bona fide attorney-client relationship with the other lawyers and thus should recover attorney's fees under EAJA for the time they spent working on his case.

That factual issue does not warrant review by this Court. In any event, the court of appeals correctly rejected petitioner's claim of an attorney-client relationship, in light of the findings that none of petitioner's colleagues entered an appearance for petitioner during the merits phase of the case, there was no agreement concerning fees for legal services rendered, none of petitioner's alleged co-counsel ever billed him for services rendered, and none of them received or contemplated receiving fees. As the magistrate judge concluded (after seven days of evidentiary hearings), "[n]obody expected to get paid." Pet. App. 70a. Indeed, as the court of appeals observed, it was only after petitioner prevailed on the merits that he and his colleagues realized that they might be able—in his

words—to "stick the government" for attorney's fees. *Ibid.* Accordingly, the court of appeals correctly held that petitioner could not collect attorney's fees for lawyers who did not act as his attorneys. *Id.* at 71a.

b. The court of appeals also correctly held that petitioner was not entitled to a fee award for services of a paralegal. Pet. App. 71a n.1. Petitioner contends that, at most, the court of appeals should have remanded the matter to the district court or it should have awarded fees for services of "an independent expert paralegal." Pet. 18. But the paralegal, a retired government employee who had some background dealing with administrative matters, was neither offered nor qualified as an expert witness in this case. He functioned, at most, as a law clerk to petitioner, assisting with the drafting of papers. And, as the district court recognized, this was a "routine APA case" (see Pet. App. 65a-66a) and no expert study or analysis was required.

Moreover, as the court of appeals observed in the context of rejecting petitioner's attempt to claim fees for himself as an expert, allowing a pro se litigant to recover fees for legal services by characterizing them as "expenses of expert witnesses" or the "reasonable cost" of various studies, rather than as attorney's fees, would vitiate the holding of *Kay* as applied to the EAJA and make the determination of fee eligibility rest on the semantics of the litigant's fee petition. Pet. App. 67a. The same reasoning applies to petitioner's claim for fees for the paralegal as an expert in this case because any award for that paralegal work would, in essence, be derivative of an award for attorney's fees to which petitioner is not entitled. Accordingly, the court properly held petitioner ineligible to claim attorney fees for himself by relabeling them as "expert expenses." *Id.* at 68a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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